82-2062

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 1983

NO. 83-_____

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of Leong Chong, and as Next Friend of Leong Choy Wan, Leong Choy Har, Leong Choy Fong and Leong Choy Lan; YIP ONG CHU, Individually and as Representative of the Estate of Teo Ho Aik, Deceased, and as Next Friend of the Two Minor Children of Loo Wee Sang, Individually and as Representative of the Estate of Koo Ming Quang,
Petitioners

v.

ESSO OIL COMPANY, ESSO EXPLORATION, INCORPORATED, EXXON COMPANY U.S.A., EXXON CORPORATION, ESSO TANKERS, INCORPORATED and EXXON INTERNATIONAL CO., INCORPORATED,
Respondents

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I.

Whether, in this suit brought under the Jones Act, 46 U.S.C. §688, the Death on the High Seas Act, 46 U.S.C. §761, et seq., the general maritime law of the United States, and the Texas wrongful death and survival statutes, Arts. 4761, et seq., and 5525 of R.C.S., by Malaysian widows and survivors against American owned or based corporations, the ruling of the district court that the law of Singapore should apply and the case should be dismissed on grounds of forum non conveniens, was - in view of the undisputed facts that the vessel on which the fatal accidents in question occurred was a traditional sailing vessel, a tanker; was owned by a corporation of convenience (Liberian) with the beneficial ownership in a United States company (Exxon); was carrying a flag of convenience (Liberian), with the beneficial flag-state being the United States; was operated by an American corporation (Exxon) from its offices in Texas and New Jersey,

pursuant to a contract calling for the application of American law; was, when the accidents occurred, only temporarily in Singapore harbor for repairs which were being made under the supervision of two Exxon officers from the United States; and which was crewed by Italians who allegedly caused the accidents and who sailed with the vessel from Singapore shortly after the accidents occurred - "inadvisably entered", as that term was employed by this Court in Link v. Wabash Railroad Co., 370 U.S. 625 (1962), so as to have made the district court's refusal to grant relief under Rule 60b, F.R.C.P., an abuse of discretion.

II.

Whether the failure of the district court to grant relief under Rule 60b with respect to changes in or clarifications of law, which occurred after the time for appeal had run, was an abuse of discretion.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioners:

Chick Kam Choo, Individually and as Administratrix and/or Representative of the Estate of Leong Chong, and as Next Friend of Leong Choy Wan, Leong Choy Har, Leong Choy Fong and Leong Choy Lan; Yip Ong Chu, Individually and as Representative of the Estate of Teo Ho Aik, Deceased, and as Next Friend of the Two Minor Children of Loo Wee Sang, Individually and as Representative of the Estate of Koo Ming Quang.

Respondents:

Esso Oil Company

Esso Exploration, Incorporated

Exxon Company U.S.A.

Exxon Corporation

Esso Tankers, Incorporated

Exxon International Co., Incorporated

NOTES OF REFERENCE

Exxon Corporation is a Delaware corporation with its principal places of business in New York and Texas. It will be hereinafter referred to as "Exxon".

Esso Tankers, Inc. is a Liberian corporation which is a 100% indirectly owned affiliate of Exxon Corporation. It will be hereinafter referred to as "ETI".

Exxon International Company is an unincorporated division of Exxon Corporation and will be hereinafter referred to as "EIC".

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REFERENCE TO OFFICIAL AND
UNOFFICIAL REPORTS OF OPINIONS
DELIVERED BY THE COURTS BELOW

1. The Judgment and Dismissal of the District Court was entered on July 31, 1980. The District Court based its Order of Dismissal upon the "Memorandum and Recommendation" of the United States Magistrate, Honorable Lingo Platter. That Memorandum and Recommendation was dated June 18, 1980. The Judgments and Orders of the District Court with respect to said Dismissal are attached hereto as Exhibits 1A - 1C, which include the Memorandum and Recommendation of the Magistrate, the Order of Dismissal and the Final Judgment.

2. In response to the filing of a Motion for Relief under Rule 60b by the Plaintiffs, the District Court, on December 8, 1981 entered a "Minute Entry" denying the Plaintiffs Motion for Rule 60b relief. That Minute Entry is attached as Appendix 2.

3. The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit, dated January 24, 1983, is reported at 699 Fed.2d 693. The Opinion and Judgment of the Court of Appeals is attached as Appendix 3.
4. The Order of the United States Court of Appeals, Fifth Circuit, denying the Petitioners Petition for Rehearing and Rehearing En Banc, dated March 11, 1983, is attached as Appendix 4.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Judgment of the Court of Appeals was entered on January 24, 1983. A timely petition for rehearing and Rehearing en banc was denied on March 11, 1983. The jurisdiction of this Court is invoked under 23 U.S.C. Section 1254(1).

TREATIES, UNITED STATES STATUTES AND RULES AND TEXAS STATUTES WHICH THIS CASE INVOLVES

This case involves directly and indirectly the construction and application of the following treaty provisions, United States Statutes and Rules and Texas Statutes: 46 U.S.C. 688, known as the Jones Act; 46 U.S.C. 761-768, particularly section 761 and 764, commonly known as the Death on the High Seas Act; 28 U.S.C 1350; Shipowners Liability (sick and injured seamen) Convention of 1936, 54 Stat. 1693; Articles 4671-4678 of the Revised Civil Statutes of the State of Texas, commonly referred to as the Wrongful Death Statutes of Texas, particularly Articles 4671 and 4678 of the Revised Civil Statutes of the State of Texas, commonly referred to as the Wrongful Death Statutes of Texas, particularly Articles 4671

and Article 4678; Article 5525 of the Revised Civil Statutes of the State of Texas, commonly referred to as the Survival Statute of the State of Texas; and Rule 60b of the Federal Rules of Civil Procedures. These are all reprinted in pertinant part and attached as Appendices 5A through 5G.

STATEMENT OF THE CASE

A. Course of the Proceedings Below.

Petitioners, citizens of Malaysia, filed this suit as beneficiaries of the estate of three individuals who were killed onboard a blue-water vessel, a tanker by the name of "Esso Wilhelmshaven". The vessel was owned by a Liberian corporation, a corporation of convenience, ETI, with beneficial ownership in the U.S. parent corporation, Exxon, and was operated and managed by an unincorporated division of Exxon, EIC, from its base of operations in New Jersey. The vessel was temporarily situated in the harbor of Singapore at the time of these accidents. When the fatal accidents in question occurred, the decedents were onboard the vessel to assist in the making of repairs pursuant to a contract between EIC and Sembayang Shipyard, Ltd. of Singapore. The surviving widows, children and estates sued ETI and Exxon (EIC) under the Jones Act, 46 U.S.C. §688, the Death on the High Seas Act, 46 U.S.C. §761, et seq., the general

maritime law of the United States and the wrongful death and survival statutes of the State of Texas, Arts. 4671, et seq., and Art. 5525, R.C.S.

The Respondents alleged that the decedents were not Jones Act seamen; that the Death on the High Seas Act did not apply because the accidents occurred within the territorial waters of Singapore; and that the general maritime law and state claims should be dismissed on grounds of forum non conveniens. The district court agreed with Respondents on all counts.

At about the time the district court rendered its judgment, the attorneys who were in charge for the various decedents began to withdraw and gave no attention to the case. Several days after the thirty (30) days appeal time had expired, such attorneys completed the transfer of the attorney-in-charge position and the cases to the Petitioners' present counsel, who discovered that the previous attorneys-in-charge had not filed a notice of appeal

from the court's dismissal order. The new attorney-in-charge for Petitioners immediately filed a motion for relief under Rule 60b, F.R.C.P. The district court denied the Rule 60b motion. The court of appeals affirmed the ruling of the district court and it is with respect to that decision that Petitioners seek a writ of certiorari.

B. Evidence Relevant to the Grounds for Petition.

1. The Vessel, "Esso Wilhelmshaven". The M/S Esso Wilhelmshaven is a traditional blue-water vessel; it is a "steam turbine tanker" or a "super oil tanker" (Aff. of Robert Berner, Repair Superintendent of EIC, pp. 25, 27, Rec. 1; p. 65, Rec. 2). The log of the Esso Wilhelmshaven reflected that it had sailed all over the world, from port to port, ocean to ocean and sea to sea (see pp. 28, 29, Rec. 1, and see App. 7 attached hereto, being a summary of the log of the Esso Wilhelmshaven).

The owner of the Esso Wilhelmshaven was ETI, a Liberian corporation 100% owned by

Exxon through an affiliate (Vol. 1, pp. 20-24). The vessel was managed by Exxon, a Delaware corporation with its home office in New York, by and through its unincorporated division, EIC (Vol. 1, Rec. p. 20; and see Marine Services Agreement, a part of Aff. of Rudolph W. Haessner, Supp. Rec., which agreement is attached hereto as App. 6). EIC had its home office and base of operations at 220 Park Avenue, Florham Park, New Jersey 07932 (Vol. 1, Rec., p. 20; Aff. of Berner, Rec. Vol. 1, p. 25; see also App. 6; see Aff. of C. A. Shiau, Vol. 1, pp. 32, 33; Vol. 2, pp. 63-66, 71; see answers to interrogatories, Vol. 2, p. 100; and see Vol. 2, Rec., p. 108).

The vessel was registered under the laws of Liberia, the place of incorporation of ETI (Rec., Vol. 1, pp. 20-24), but there is absolutely no evidence in the record that Exxon or any of its subsidiaries had any active office, assets or bona fide operation in Liberia; the Liberian flag and the Liberian corporation ETI were indisputably

a flag and a corporation of convenience (see entire record).

The crew and officers of the Esso Wilhelmshaven were all "Italian nationals" who had signed the usual articles of seamen with ETI (Berner's Aff., pp. 25-27; and see crew list attached hereto as App. 8).

2. The Accidents. When the Esso Wilhelmshaven arrived in Singapore, EIC entered into a repair contract with Sembayang Shipyard, Ltd. of Singapore to make some repairs on the vessel (Rec. 1, pp. 25-27). The vessel remained in Singapore only a little over 30 days.[1] The two people in charge of the repair work, the "repair superintendent and assistant superintendent", were Americans, employees of EIC, by the names of Berner and Shiau, both of "220 Park Avenue, Florham Park, New Jersey 08932" (Rec. 1, pp. 25-27, 32, 33; Rec. 2, pp. 63-66, 70, 71, and see p. 113). During the

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[1] The Esso Wilhelmshaven "arrived in Singapore from Japan on the 27th of February, 1977...(s)ubsequently it sailed for Bahrain on 2nd of April, 1977" (Rec. 1, p. 109).

repairs, and at the time the decedents were killed, the Esso Wilhelmshaven was in the water and "moored" (not drydocked) (Rec. II, p. 107).

The three decedents in this case were Malaysians who were employed to work onboard the Esso Wilhelmshaven as shipwrights and welders and to assist in repairs upon it (Aff. of Ahg Juniah, Vol. I, pp. 40-48; Vol. II, p. 102). They were killed in two separate accidents, both of which were, from the evidence submitted, probably caused by the negligence of the Italian crew members and/or their carelessness in maintaining the vessel properly. Leong Chong was killed while working in a hold of the vessel; the Italian crewmen working above him negligently allowed a valve spindle to fall through the "access hole" and kill him (the "Coroner's Report", Rec. Vol. I, pp. 98-114). The other two decedents, Aik and Quang, were welding in port tank #3 (Rec. Vol. II, p. 153); they had not been warned by the Italian crewmen of the presence

of oil or combustible substances; while they did their work an explosion took place, killing them (see Coroner's Inquiry, Vol. II, pp. 135-184).

3. Relevant Contracts. The repair contract between EIC and Sembayang was executed by EIC at "220 Park Avenue, Florham Park, New Jersey 07932 U.S.A." (Rec. II, p. 228); the contract is replete with references to the control to be maintained by Berner and Shiau and the EIC people; it provides that "any dispute or differences of opinion . . . shall be left to the decision of the owner (ETI) or its accredited representative whose decision shall be final and binding on both parties" (Rec. II, p. 229; emphasis ours); it further provides that "all non-technical differences or disputes arising out of or in anyway concerning this contract shall be finally settled under the rules of conciliation and arbitration of the International Chamber of Commerce . . ." (Sheet No. VI of Repair Contract, attached to Haessner Aff., Supp. Rec.).

The Marine Services Agreement between ETI and EIC provides that EIC will operate and control the vessel; that it was executed in the United States; and most importantly, that "this agreement shall be governed by the laws of the State of New York" and that "any controversy or claim arising out of or relating to this agreement....shall be settled by arbitration in accordance with the rules of the American Arbitration Association" (p. 4 of App. 6; emphasis ours).

4. Findings of the District Court. The district court found that the Esso Wilhelmshaven was "managed" by EIC from its base of operations in the United States (see pp. 1, 4 of App. 1A). The district court also found that the vessel was "owned by an affiliate of Exxon, and the headquarters of Exxon is in Houston" (pp. 4, 5 of App. 1A).

5. Singapore Law. The affidavits of the Respondents indicate that the only way the Petitioners could get jurisdiction over the Respondents in Singapore would be by "arresting the vessel" (Rec. I, p. 28;

Rec. II, p. 188); this, of course, has been impossible since April 1, 1977, when the Esso Wilhelmshaven left Singapore (Rec. I, p. 28). Although the district court conditioned its dismissal upon a voluntary appearance by the Defendants in Singapore and a waiver of the statute of limitations of Singapore, the Defendants did not produce any evidence as to whether Singapore law will recognize a waiver of such matters (see entire record). Moreover, while the statute of limitations for any action for negligence or damages in Singapore is three years (Rec. I, pp. 70, 71), Singapore law does provide a tort remedy to the survivors, although such remedy perhaps may be waived by the acceptance of workmen's compensation benefits (Rec. I, pp. 40-48, 71, 72; Rec. II, pp. 189, 190, 239-246).

6. Location of Witnesses. As to the location of the key witnesses in this litigation, the Petitioners are Malaysians (see Rec. II, p. 243); the crew members of the vessel in question are all Italian (see

Aff. of Berner, Rec. I, pp. 25-27; and App. 8); and Petitioners have stipulated and agreed to use only American experts, such as marine and tanker experts from Philadelphia and Texas, concerning liability, and clinical psychologists and economists from Houston, Texas concerning damages (see pp. 15-16 of Plaintiffs-Petitioners Original Brief before the Fifth Circuit).[2]

7. Failure to File Notice of Appeal Within 30 Days of Dismissal Order. With reference to the failure of Petitioners to file a notice of appeal before twelve weeks

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[2] It is interesting to note that in the answers to interrogatories the Respondents indicated that the witnesses who would be used to support their case "are those persons whose testimony was obtained at the Coroner's Inquest in Singapore (some of whom were Malaysian, some of whom were Singaporans, some of whom were Italian, some of whom were American); the two representatives of EIC who were onboard the vessel (Mr. Berner and Mr. Shiau) and other employees of EIC or of Exxon Corporation (all of whom were based in New Jersey or New York, as implied in the affidavits filed by the Respondents) and the officers and members of the crew of the vessel (all of whom were Italians)" (see Answers to Interrogatories, No. 23, on p. 116 of Rec., Vol. II).

after summary judgment was entered in this cause, the evidence before the court in this matter is unrefuted by the Respondents, and it consists of the sworn statements contained in the Rule 60b motion and the statements at the Rule 60b hearing before the district court (see Rec. II, p. 40; the Rule 60b motion; and see the Trans. of Hearing on Rule 60b motion). It is there revealed that at the time the court handed down its summary judgment the two attorneys-in-charge for the two separate accidents, Messrs. Koerner and Chaffin, were in the process of transferring the primary responsibility for the case over to the present counsel; because they were getting out of the cases, and in the confusion of completing the process of transfer, they failed to file notice of appeal within 30 days of the date the judgment was entered. The present counsel, upon taking over the case, discovered that the notice of appeal had not been filed and a Rule 60b motion was filed forthwith. The Respondents did

not contend or attempt to show any intervening equities or prejudice in favor of Respondents, arising out of the filing of the Rule 60b motion eight weeks after the appeal time had expired.

8. Law Subsequent to Expiration Of Time For Filing Notice Of Appeal. On August 30, 1982, the 30-day appeal time expired. On the 1st of October, 1980 the Fifth Circuit handed down its decision in Sanchez v. Lofland Brothers, 626 F.2d 1228 (5th Cir., 1980) Cert. Den. 101 S.Ct. 3112, which clarified the Fifth Circuit position that the Death on The High Seas Act does apply in the territorial waters of a foreign nation. Since the Respondents had contended, and the District Court had held, that the Death on the High Seas Act did not apply in the territorial waters of Singapore, the subsequent decision of the Fifth Circuit in Heli Sanchez became controlling. Petitioner's Rule 60b motion was filed just a few days after such decision.

C. Basis for Federal Jurisdiction in the District Court.

The basis for jurisdiction in the district court was the Jones Act, 46 U.S.C. §688, the Death on the High Seas Acct, 46 U.S.C. §761, et seq., and the general maritime law of the United States.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

The Court of Appeals in this case unreasonably and improperly narrowed the scope of Rule 60b of the Federal Rules of Civil Procedure, contrary to the expressed intent of this Court in Link v. Wabash, 370 U.S. 625 (1962), and in Klapprott v. United States, 335 U.S. 601 (1948).

This Court gave us a good idea of the purpose and scope of Rule 60b in Link v. Wabash Railroad Co. In that case, the plaintiff filed a timely notice of appeal rather than filing a Rule 60b motion. The Supreme Court affirmed the district court's dismissal, but Mr. Justice Harlan, the writing Judge, went out of his way to suggest that the plaintiff in that case should have filed a Rule 60b motion instead of filing a notice of appeal:

> "In addition, the availability of corrective remedies such as is provided

> by Federal Rules of Civil Procedure 60b - which authorizes the reopening of cases in which final orders have been inadvisably entered - renders the lack of prior notice of less consequence (that is, prior notice to the court's entry of the dismissal order). Petitioner never sought to avail himself of the escape hatch provided by Rule 60(b) . . ." (370 U.S. at pp. 632, 635, 636; emphasis ours).

In Klapprott, the plaintiff filed a Rule 60b motion more than four years after a default judgment had been rendered against him. The facts showed that even though the plaintiff had received notice of all of the proceedings which resulted in the default judgment, during the period of time in question he was absorbed with defending himself against criminal prosecution in other cases and/or was under custody. Moreover, the facts showed that he had no money to hire a lawyer and was ill during some portion of the relevant time.

The district court and the court of appeal denied his Rule 60b motion and this Court granted certiorari. This Court first noted that the Rule 60b motion probably

should have been granted on the grounds that the judgment was void, since no evidence was presented at the time the default judgment was granted. The subject matter of the initial suit was the denaturalization of the plaintiff. This Court went on to note pertinently:

> "Third. But even if this judgment of denaturalization is not treated as void, there remain other compelling reasons under amended 60(b) for relieving the petitioner of its effect. Amended 60(b) provides for setting aside a judgment for any one of five specified reasons or for 'any other reason justifying relief from the operation of the judgment.' The first of the five specified reasons is 'mistake, inadvertence, surprise, or excusable neglect'. To take advantage of this reason the Rule requires a litigant to ask relief 'not more than one year after the judgment was entered or taken.' It is contended that the one-year limitation bars petitioner on the premise that the petition to set aside the judgment showed, at most, nothing but 'excusable neglect.' And of course, the one year limitation would control if no more than 'neglect' was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b).... (But) petitioner's prayer to set aside the default judgment did not rest on mere allegations of 'excusable neglect'.
>
> . . .

"Under such circumstances petitioner's prayer for setting aside the default judgment should not be considered only under the excusable neglect, but also under the 'other reason' clause of 60(b), to which the one year limitation provision does not apply....

"Thus we come to the question whether petitioner's undenied allegations show facts 'justifying relief from the operation of the judgment.' It is contended that the 'other reason' clause should be interpreted so as to deny relief except under circumstances sufficient to have authorized relief under the common law writs of coram nobis and audita querela, and that the facts shown here would not have justified relief under these common law proceedings. One thing wrong with this contention is that few courts ever have agreed as to what circumstances would justify relief under these old remedies. To accept this contention would therefore introduce needless confusion in the administration of 60(b) and would also circumscribe it within needless and uncertain boundaries. furthermore 60(b) strongly indicates on its fact that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.

. . .

"Fair hearings are in accord with elemental concepts of justice, and the language of the 'other reason' clause of

> 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing." (69 S.Ct. at pp. 389-3 1; emphasis ours).

What can be perceived from this Court's holding in Klapprott is that the "other reason" provisions of subsection 6 of Rule 60b are to be construed broadly and authorize the Court to vacate or take action with respect to final orders or judgments for any reasons that would seem to "accomplish justice". Moreover, this Court made it clear, at least by implication, that if a Rule 60b motion is filed within one year, the court should consider rectifying the mistakes alleged in the motion, even though the motion was made necessary by the "mere neglect" of the plaintiff or his counsel.

In the case at bar the motion was filed within ninety days of the granting of the dismissal order and certainly the facts, which were undisputed before the district court and the court of appeals, established no more than "mere neglect" on the part of

plaintiff's counsel at that time.

This would seem to be the prevailing view. As expressed in Wright & Miller, Federal Practice & Procedure, Vol. 11, Sec. 2864:

> "There has not been much difficulty in construing or applying the rule in cases in which the motion is made within a year of judgment. In those cases it is not important to decide whether the motion in fact comes under clause (6) or under one of the earlier clauses. These prompt motions for relief are granted if the court thinks that justice requires it and denied if the court feels otherwise."

The Fifth Circuit, up until the recent decisions in Alvestad v. Monsanto, 671 F.2d 908 (5th Cir. 1982), cert. den. 103 S.Ct. 489, and in this case, had duly followed the rationale that Rule 60b should be broadly and liberally construed. For example: (a) in Meadows v. Cohen, 409 F.2d 750 (5th Cir. 1969), Lairsey v. Advance Abrasives Co., 542 F.2d 928 (5th Cir. 1976), Oliver v. Home Indemnity Co., 470 F.2d 329 (5th Cir. 1972), and McDowell v. Celebrezze, 310 F.2d 43 (5th Cir. 1962),

the Fifth Circuit adopted the rule that a "mistake of law is a mistake correctible under 60(b)(1)" (542 F.2d at p. 929); (b) in Burnside v. Eastern Air Lines, Inc., 519 F.2d 1127 (1st Cir. 1975); Hand v. U.S., 441 F.2d 529 (5th Cir. 1971); Smith v. Jackson Tool & Die, Inc., 426 F.2d 5 (5th Cir. 1970); and in Lairsey (at p. 931), the Fifth Circuit held that a Rule 60b motion filed after the time for appeal had run but within the one year provided for in Rule 60b should be considered with the same liberality as a Rule 60b motion filed within the time for the filing of notice of appeal and requires the courts to consider the mistakes alleged in the Rule 60b motion; (c) in Lairsey and Oliver v. Monsanto Co., 487 F.2d 514 (5th Cir. 1973), affg. 56 F.R.D. 370 (S.D. Tex. 1972), the Fifth Circuit held that any changes in the law or clarifications of the law, occurring after the time for appeal had run, mandate the granting of Rule 60b relief (see Lairsey

at pp. 929, 930); (d) in In Re Casco Chemical Co., 335 F.2d 645 (5th Cir. 1964), Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981), United States v. Gould, 301 F.2d 353 (5th Cir. 1962), Greater Baton Rouge Golf Association v. Recreation & Park Commission, 507 F.2d 227 (5th Cir. 1975), Laguna Royalty Co. v. Marsh, 350 F.2d 817 (5th Cir. 1965), and in Serio v. Badger Mutual Insurance Co., 266 F.2d 418 (5th Cir.) cert. den. 361 U.S. 832 (1959), the Fifth Circuit held that Rule 60b should be liberally construed; (e) in Seven Elves, Inc. v. Eskenazi, the Fifth Circuit held that where denial of relief from a final judgment or order precludes examination of the "full merits of the cause", even a "slight abuse of discretion" on the part of the district court in denying Rule 60b relief will require reversal (635 F.2d at p. 402); (f) in Seven Elves v. Eskenazi and in United States v. Gould, the Fifth Circuit held that Rule 60b relief is generally

always appropriate where there are no "intervening equities that would make it inequitable to grant relief" (635 F.2d at p. 402); (g) in United States v. Gould, Lairsey, Oliver v. Home Indemnity, Meadows v. Cohen and McDowell v. Celebrezze, the Fifth Circuit held that it is always desirable for a district court to correct its own clear and facial errors of law and/or fact in order to avoid the expensive and time consuming process of appeal (see especially 470 F.2d at p. 331, footnote 2); (h) in Seven Elves, Lairsey, Brothers, Inc. v. W. E. Grace Manufacturing Co., 320 F.2d 594 (5th Cir. 1963), Serio v. Badger Mutual Insurance Co., supra, and Menier v. United States, 405 F.2d 245 (5th Cir. 1968), the Fifth Circuit made it clear that it would follow the general and prevailing view that Rule 60b relief should be granted in order to avoid injustices and accomplish the broad and liberal purposes of Rule 60b; and (i) in Seven Elves v. Eskenazi,

the Fifth Circuit held that simple negligence and/or gross neglect of counsel with respect to a plaintiff's rights is sufficient to constitute "excusable neglect" within the meaning and intent of Rule 60b.

Despite all those salutary decisions, the Fifth Circuit has recently made an about face. In Alvestad v. Monsanto, and in this case, the Fifth Circuit has taken the view that the only mistakes that should be considered are those which are "at variance with the plain wording" of a federal statute (670 F.2d at 912 and 699 F.2d at 695); that a Rule 60b motion filed after the time for appeal has run will generally always be considered an attempt to substitute Rule 60b relief for the filing of a notice of appeal and will be denied, thus totally overruling the holdings in Burnside and Lairsey; in Alvestad and this case the Fifth Circuit ignored the rule established in Lairsey and Oliver v. Monsanto that postjudgment changes or

clarifications in the law generally mandate Rule 60b relief; the Fifth Circuit in Alvestad and this case backed away from the Supreme Court's and other circuits' mandate, and what had previously been the mandate of the Fifth Circuit, to construe Rule 60b "liberally"; the Fifth Circuit in this case virtually abolished the "slight abuse" standard even though it had previously applied it in Seven Elves to all situations where there had not been an examination of the "full merits" of the case (699 F.2d at 696); the Fifth Circuit, in both Alvestad and in this case, ignored the fact that there were "no intervening equities" which would cause any prejudice to the defendants for the granting of Rule 60b relief; in both Alvestad and in this case the Fifth Circuit limited Rule 60b virtually to situations where an order was entered in an "ex parte context" (699 F.2d at p. 696);

in both Alvestad and this case it held that a Rule 60b motion will almost always be denied on the grounds it circumvents the appeal process, even though the motion was filed within one year, the Court stating in this case that "all these mistakes, if mistakes they be, are mistakes of law and could have been raised on appeal" (699 F.2d at p. 696); the Fifth Circuit in both Alvestad and this case took a "hard line" and seemed to ignore any considerations concerning the injustices or inequities to the plaintiffs that resulted from the denial of Rule 60b relief; and last, but certainly not least, the Fifth Circuit held in Alvestad and in this case that, directly contrary to the position it took in Seven Elves v. Eskenazi, simple negligence and/or gross negligence of counsel in failing to appear or file notice of appeal or to take appropriate action in said case precludes the granting of Rule 60b relief.

To put it another way, one who compares the decisions of the Fifth Circuit leading up to the recent decisions in Alvestad and in this case,[3] can see that there has been a clear shift in the views of the Fifth Circuit; it has taken a hard turn toward a restrictive and narrow view of Rule 60b. While we all, as lawyers, must, frankly speaking, deal with the realities of the changes in the constitution of the court through the processes of appointment, if our common law tradition and the doctrine of stare decisis are to continue to have any meaning in our system of jurisprudence, such abrupt and devastating changes in approach to the application of a rule or

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[3] There are other Fifth Circuit decisions wherein the denial of relief was affirmed, e.g. Fackelman v. Bell, 564 F.2d 734 (5th Cir. 1977), but none of those cases represented the rank departure from the conventional wisdom that Alvestad and this case do.

statute or a principle of law or procedure should not be countenanced. We sincerely believe that this is the kind of situation that is most appropriate for the granting of writ of certiorari.

Indeed, there is another reason for the granting of certiorari, and that is the total conflict now established by the Fifth Circuit in Alvestad and in this case between the Fifth Circuit and the other circuits. For example, in Alvestad the court backs away from the holding of the Fourth Circuit in Compton v. Alton Steamship Co., 608 F.2d 96 (4th Cir. 1979) (see 671 F.2d at p. 912). Other cases which are virtually contradicted by the recent pronouncements in Alvestad and this case include the Seventh Circuit case of Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th Cir. 1971), cert. den. 405 U.S. 921 (1972); the Second Circuit decision in Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2nd Cir. 1963); and the D.C.

Circuit case of Bridoux v. Eastern Air Lines, Inc., 214 F.2d 207 (D.C. Cir. 1954). The essence of these decisions and many more from the other circuits is that the courts should, and do, consider Rule 60b motions consistent with the holdings of this Court in such cases as Klapprott and Link v. Wabash. To allow the Fifth Circuit to continue to tighten, narrow and emasculate the true meaning and purpose of Rule 60b will only result in continued confusion among the circuits, as well as continued suffering of injustices by such parties as the widows and children in Alvestad and in this case.

The essence of the real question before this Court is whether, assuming arguendo that the actions of the district court counsel in this case, in failing to see to it that notice of appeal was filed prior to handing over the case to the new counsel-in-charge, was simple neglect, the Plaintiffs

are automatically precluded from Rule 60b relief despite the fact that the district court committed clear legal errors and made clear legal mistakes and despite the fact that changes and/or clarifications of the law, which were material to the decision of the district court, occurred after the time for appeal had run. It had been the view of the Fifth Circuit that the reasons for granting Rule 60b relief should be considered separate and apart from each other, particularly since the disjunctive is used. See Transit Casualty Co. v. Security Trust Co., 441 F.2d 788 (5th Cir. 1971). Now, instead of construing Rule 60b in the disjunctive, the Fifth Circuit has taken the radical new view that apparently there must be a presence of a combination of the various factors listed in Rule 60b. This contradicts the plain language of Rule 60b. Rule 60b states that relief should be granted in the case of "mistake, inadvertence, surprise or excusable neglect"

(emphasis ours); yet the Fifth Circuit has taken the point of view that there must be present both "excusable neglect" and "mistake". We submit that the Court should grant certiorari to lay to rest any doubt and confusion among the lower courts so that all will know that Rule 60b provides separate grounds for relief, including those listed within such sections such as section (1) and that Rule 60b relief should always be granted where to do so will, without requiring utilization of the expensive and time consuming appeal process, result in the correction of, as this Court stated in Link v. Wabash, judgments "inadvisably entered".

II.

Rule 60b relief is mandated in this case to correct the facially clear errors and fundamental misconceptions of law of the district court, which resulted in a judgment being "inadvisably entered".

A. The most facial and flagrant error of the district court was its refusal to apply the venerable tenets of Lauritzen v. Larsen, 345 U.S. 571 (1953); Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970); Fisher v. Agios, 628 F.2d 308 (5th Cir. 1980), reh. den. 636 F.2d 1107, cert. den. 102 S.Ct. 92; Bartholomew v. Universe Tankships, Inc., 263 F.2d 432 (2nd Cir. 1959), cert. den. 359 U.S. 1000; Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307 (2nd Cir. 1976); Moncada v. Lemuria Shipping Corp., 491 F.2d 470 (2nd Cir.); and Castanho v. Jackson Marine, Inc., 650 F.2d 546 (5th Cir. 1981), sec. dec. Nov. 13, 1981 (unpublished), Cause No. B-79-437-CA, E.D. Tex. These decisions, which specifically apply to all blue-water vessels such as the Esso Wilhelmshaven, state that in determining choice-of-law with reference to maritime claims, the court should give controlling weight to such elements as the nationality of the owner and/or operator of the vessel,

base of operations of the owner/operator and, in flag of convenience or corporations of convenience situations, the nationality of the true beneficial owner and true beneficial flag-state of the vessel.

In Bartholomew the defendant vessel flew the flag of Liberia (as in this case) and was owned by a Liberian corporation (as in this case). However, the stock of the Liberian corporation was owned by a Panamanian corporation which was in turn owned by American citizens (as in this case). In addition, all of the supervisory personnel of the Liberian corporation were Americans, and its principal place of business was in the United States (as in this case). The great Judge Medina had this to say:

> "(L)ooking through the facade of foreign registration and incorporation to the American ownership behind it is now well established . . . . This is essential unless the purposes of the Jones Act are to be frustrated by American shipowners' intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign

> flag . . . . In the case now before us appellant has taken the trouble to insert an additional nominal foreign corporation between the flag and the true beneficial ownership of the vessel. But we have little difficulty in brushing all this aside when considering the application vel non of the Jones Act. Complicating the mechanics of evasive schemes cannot serve to make them more effective." 263 F.2d at p. 442. [3a]

The Fifth Circuit expressly followed that view in Fisher v. Agios. The Fifth Circuit had already led the way in establishing the base of operations doctrine enunciated in Rhoditis (412 F.2d 919, affd. 398 U.S. 398, 1970). As stated in Antypas, when one is dealing with blue-water vessels, where the majority of the stockholders of the shipowner are "American citizens" (such as Exxon being the beneficial owner of ETI, and EIC being a subdivision of Exxon), this contact in and of itself has been "held sufficient to

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[3a] While Bartholomew involved the Jones Act, the same rules with respect to choice-of-law apply to the general maritime law and the Death on the High Seas Act. Romero v. International Terminal Operating Co., 358 U.S. 382 (1959).

support jurisdiction under the Jones Act" (541 F.2d at p. 310).[4]

Aside from this case, we know of no other case in which a court has not held American law to be mandated where a traditional blue-water vessel is owned or operated by Americans or where the flag-

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[4] Cases such as Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980), cert. den. 451 U.S. 920 (1981); Chiazor v. Transworld Drilling, 648 F.2d 1015 (5th Cir. 1981), cert. den. 102 S.Ct. 1714 (1982); Borralho v. Keydril, 696 F.2d 379 (Jan. 27, 1983), pet. for reh. and reh. en banc pending; Bailey v. Zapata, slip op., No. 82-2060, Feb. 17, 1983, 5th Cir.; and Zekic v. Reading and Bates, 680 F.2d 1107 (5th Cir. 1982), commonly referred to as the "rig cases exception" to the tenets of Lauritzen, Rhoditis, and Fisher v. Agios , are distinguishable because they are confined to jack-up and semi-submersible rigs and do not apply to blue-water vessels. See Castanho, particularly the second decision (Nov. 13, 1981, unpublished, Cause No. B-79437-CA, E.D. Tex.), where the court held that even a supply vessel which basically remained in the North Sea servicing jackup and semi-submersible rigs in that area, was still a blue-water vessel and outside the scope of Phillips, Chiazor, etc. We note that this Court has never sanctioned

state or beneficial flag-state is the United States or where the base of operations is in the United States. Thus, without any doubt, the failure of the district court to apply American law to this case constitutes such a "fundamental misconception of the law", as conceived by the Supreme Court and even

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4 (continued)
the rig cases exception espoused by the Ninth Circuit in Phillips v. Amoco and adopted by the Fifth Circuit in Chiazor v. Transworld. Moreover, H.R. 3942, signed into law on December 29, 1982, which codified the "rig cases exception", contains an express savings clause:

> "The amendment made by this Section does not apply to any action arising out of an incident that occurred before the date of enactment of this Section."

Thus, H.R. 3942 clearly demonstrates the intention of Congress that the courts, with respect to all accidents occurring prior to the enactment of Section 503 of H.R. 3942, should retain jurisdiction over such cases and handle them under American law. Otherwise, the Congress would have been performing a vain act; that is, passing a total unnecessary piece of legislation, and the general rule of legislative construction is that there is a presumption to the contrary. 73 Am.Jur.2d 249, p. 422; Crowell v. Benson, 295 U.S. 22 (1932); and Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 391 (1940).

by the Fifth Circuit itself (Fisher v. Agios), as to demand relief under Rule 60b for these widows and children.

B. The district court demonstrated another fundamental misconception of the law when it ignored the fact that the two corporations which owned and managed the Esso Wilhelmshaven had, in the Marine Services Agreement, selected the forum in which they wanted all matters arising out of the use of the Esso Wilhelmshaven to be settled, namely New York, United States of America. According to the Supreme Court of the United States in Bremen v. Zapata, 407 U.S. 1 (1972), and in Lauritzen v. Larsen,[5]

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[5] In Lauritzen v. Larsen, this Court stated:

> "Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply. We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the

these two corporations, which are presumably sophisticated enough to make an intelligent choice as to which law they want to apply, and in which forum they want to settle matters arising out of the use of the Esso Wilhelmshaven, must be bound by their selection. The district court's failure to enforce the voluntary forum selection clause of ETI and EIC, in accordance with Bremen v. Zapata and Lauritzen v. Larsen, was so fundamental a misconception of the law as to mandate relief under Rule 60(b).

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5 (continued)
high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. The Belgenland, 114 US 355, 367, 29 L Ed 152, 156, 5 S Ct 860; The Hanna Neilson (DC NY) 273 F. 171. We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship" (345 U.S. at pp. 588, 589).

C. Another instance of fundamental misconception of law involves the district court's dismissal of this case under the doctrine of forum non conveniens even though the maritime law of the U.S. applies, without making a correct analysis of the convenience of the parties, without analyzing the law of Singapore, and in the face of 46 U.S.C. §764, the Shipowners' Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693, and Art. 4678 of the Revised Civil Statutes of Texas.

1. All circuits have consistently held that the application of the maritime law of the United States compels a denial of a forum non conveniens motion. DeMateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977), cert. den. 435 U.S. 904; Antypas v. Cia Maritima San Basilio, S.A., supra; and Fisher v. Agios, supra. Thus, since American

law is mandated in this case, it becomes "facially clear" that the district court's dismissal on grounds of forum non conveniens constituted such a "fundamental misconception of the law" as to demand relief under Rule 60b.[6]

2. In analyzing the convenience of the parties, as we pointed out in the statement of facts, it is undisputed that all of the crew, who are the important witnesses concerning the liability situation, are Italian. The two people who supervised the repair work are Americans. The experts, who will be the most crucial witnesses, are Americans, in accordance with Petitioners' stipulations.[7] Moreover, what is inconvenient

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[6] The comments of this Court in Piper Aircraft v. Reyno, 70 L.Ed.2d 419 (1981), are not inconsistent with DeMateos, Antypas or Fisher v. Agios because Piper is not a maritime case.

[7] This Court in Piper v. Reyno, supra, sanctioned the influencing of forum determinations through stipulations. The Court said that it would give weight to the defendants' stipulation to accessibility in the foreign forum and what is fair for the goose is

about these two powerful American corporations having to defend themselves in their own home country? As stated by the Fifth Circuit in Tivoli Realty v. Interstate Circuit, Inc., 167 F.2d 155 (5th Cir. 1948), "(i)t is a fair inference that ordinarily one's domicile is not an inconvenient place to be sued." See also Burt v. Isthmus Development Co., 218 F.2d 353 (5th Cir. 1955), cert. den. 349 U.S. 922.

3. As to the law of Singapore, the Defendants' evidence with respect to such law did not disclose whether the law of Singapore recognizes a waiver of the statute of limitations (which is three years) and

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7 (continued)
fair for the gander. We respectfully ask the Court to give Plaintiffs the same rights. We stipulate that we will pay the Defendants' attorneys costs of going to Singapore for the few insignificant depositions that might be needed there. We stipulate that the crucial expert witnesses will all be Americans, easily

of in personam jurisdictional requirements. Some foreign jurisdictions do not recognize such waivers. See In Re Aircrash Disaster Near Bombay, India on January 31, 1978, 531 F.Supp. 1175 (W.D. Wash, 1982). If Singapore law does not recognize either one of those waivers then Plaintiffs will have no remedy in Singapore and, as this Court has made clear in Gulf Oil v. Gilbert, 330 U.S. 501 (1947), and Piper v. Reyno, forum non conveniens motions cannot be granted unless there is a remedy available to the Plaintiffs in the alternative forum. The district court totally failed to address this crucial point.

4. The district court committed facial error in holding that 46 U.S.C. §764 of the Death on the High Seas Act did not apply (because the accident occurred in the territorial waters of Singapore - see

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7 (continued)
available here. Thus, the courts, to be consistent, certainly should give consideration and weight to these stipulations in deciding the "convenience" question.

discussion infra) and thus in failing to consider whether such provision precluded a dismissal on grounds of forum non conveniens. 46 U.S.C. §764 provides:

> "Whenever an action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding."

The courts have held that the word "may", as used above, should be construed as "mandatory" and not permissive. Egan v. Donaldson Atlantic Line, 37 F.Supp. 909 (D.C. N.Y. 1941).

5. The district court also ignored such treaties as the Shipowners' Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693 (hereinafter "SLSIC"). Such treaty provides:

> "Article 11. This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure

> equality of treatment to all seamen irrespective of nationality, domicile or race."

By virtue of Article XI of the SLSIC, the national laws, which include the general maritime law of the United States, the Death on the High Seas Act and the Jones Act, are regulations relating to benefits under the Convention and should be interpreted and enforced so as to ensure equality of treatment of all those injured or killed in maritime accidents, irrespective of nationality, domicile or race. Treaties such as SLSIC grant "full" national treatment and are the "highest level of protection" afforded by treaty.[8] Moreover, such treaties are, under the Constitution, the supreme law of the land, equal to any domstic law. Farmanfarmaian v. Gulf Oil Co., 588 F.2d 880 (2nd Cir. 1978), and U.S. Postal, 589 F.2d 862, 875 (5th Cir. 1979).

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[8] See Sumitomo Shoji America, Inc. v. Avangliano, 102 S.Ct. 2374 (1982). Such treaties are consistent with the thinking

In Farmanfarmaian v. Gulf Oil Co., the court expressly held that the general rule that a foreign plaintiff's right to sue in the United States is of a lesser magnitude than that of an American citizen "has no application" where the foreign plaintiffs are by treaty given the same access to our courts as Americans. To the same effect, see Grimandi v. Beech Aircraft Corp., 512 F.Supp. 764 (U.S.D.C. Kansas, 1981).[9]

[8](continued)
of Alexander Hamilton in the Federalist Papers, where he stated in No. 80 that:

> ". . . the federal judiciary ought to have cognizance of all causes in which citizens of other countries are concerned. This is no less essential to the preservation of the public faith than to the security of the public tranquility."

[9] In this same vain, we note the provisions of 28 U.S.C. §1350. That statute provides as follows:

> "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

In Lauritzen v. Larsen, supra, Mr. Justice Jackson discussed, and cited Dickinson, The Law of Nations as Part of the National Law of the United States,

Thus, while this Court may have been correct in Piper v. Reyno, a case involving a non-maritime accident, in giving less weight to the choice of forum by a foreign plaintiff than it would have given to the choice of forum by an American plaintiff, because of the great multi-national reciprocal traditions expressed in the SLSIC treaty and by Mr. Justice Frankfurter in Lauritzen, this same rule would not seem to apply in this maritime

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9 (continued)

101 U of Pa L Rev 26, 28, 29, 792, 803-816, as authority therefor, the point that the general maritime law of the various nations of the world constitutes the law of nations:

> ". . . Hence, courts of this and other commercial nations have generally deferred to a non-national maritime law of impressive maturity and universality. It has the force of law, not from extraterritorial reach of national laws, or from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations" (345 U.S. at pp. 581-582; emphasis ours).

context.[10] Thus, for this further reason, the district court's granting of the forum non conveniens motion was facially clear error, suggesting Rule 60b relief.

6. Art. 4678, R.C.S. of Texas, Prohibits Dismissal of the State Death Claims. The Plaintiffs in this case invoked the wrongful death statutes of Texas. One of those statutes is Article 4678, which provides:

> "Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country or of this State, such right of action may be enforced in the courts of this

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[10] Indeed, the district court in this case seems to have lost sight of the court of appeals' pronouncement in Rhoditis that "maritime allegiance is not to be defined in a patriotic, nationalistic or chauvinistic sense, but in terms of economic ties" (412 F.2d at p. 926).

> State within the time prescribed for the commencement of such actions by the statutes of this State. All matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of this case."

No Texas court has ever dismissed an Article 4678 action based on forum non conveniens. Indeed, the only case directly in point, Allen v. Bass, 47 S.W. 426 (Tex.Civ.App.-El Paso 1932, writ ref'd), hold that forum non conveniens cannot apply to an Article 4678 action. There, the court was faced with a suit brought by one New Mexico resident against another New Mexico resident for damages resulting from a New Mexico accident. Utilizing the doctrine of forum non conveniens, the trial court dismissed the case and held it should be tried in New Mexico. The appellate court reversed and stated the following:

> "We have concluded that Article 4678 opens the courts of this state to citizens of a neighboring state and given to them an absolute right to maintain a transitory

> action of the present nature and to try their cases in the courts of this state."

Moreover, the court also stated the following:

> "The plaintiff is a citizen of the United States, and under Article 4678 we think he has an absolute right to maintain the present action in the courts of this state if New Mexico is to be regarded as a foreign State, within the meaning of Article 4678, and the courts of this state are left without any discretion in the matter."

We have already discussed above how the citizens of all countries who are serving upon, or working aboard, a vessel such as the Esso Wilhelmshaven, have access to our courts and our maritime laws, regardless of their nationality. Therefore, they are clearly, in the sense of the term as used in Article 4678, entitled to invoke the provisions of said statute. This being the case, the district court, which did not even deign to discuss Article 4678 or Texas law in any respect, again committed facial

and flagrant error, once again mandating relief under Rule 60b.[11]

III.

There was at least one crucial change and/or clarification of law which took place after appeal time ran which compels the granting of Rule 60b relief.

In Lairsey v. Advance Abrasive Co., 542 F.2d 928 (5th Cir. 1976); Oliver v. Monsanto,

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11 There is a serious question as to whether or not Texas recognizes the doctrine of forum non conveniens with respect to any type of case. See H. Rouw Co. v. Railway Express Agency, 154 S.W.2d 143 (Tex.Civ.App.-El Paso, 1941, writ refd.); Garrett v. Phillips Petroleum Co., 219 S.W.2d 238 (Tex.Civ.App.-Amarillo, 1949, writ dismissed w.o.j.); City of Corpus Christi v. McMurrey, 90 S.W.2d 868 (Tex.Civ.App.-Eastland, 1936, no writ); City of Tahoka v. Jackson, 276 S.W. 662 (Tex.Sup. 1925) (stating that "in this state, however, the venue of suits is prescribed by legislative enactment, and common-law rules as to venue do not obtain"); and see "Comments, Forum Non Conveniens, The Need for Legislation in Texas", 54 Tex.L.Rev. 737 (1976).

56 F.R.D. 370 (S.D. Tex. 1972), affd. 487 F.2d 514 (5th Cir. 1973); and Tarkington v. U.S. Lines Co., 222 F.2d 358 (2nd Cir. 1955), the courts held that a change in the controlling law, taking place after the time for appeal has expired, compels the granting of Rule 60b relief. The court of appeals in this case ignored that principle and did not even discuss it. We believe that error is important to the integrity of Rule 60b and should be corrected.

The thrust of the court of appeals' decision was that the errors claimed by Petitioners were not sufficiently facial and clear to justify Rule 60b relief under the "legal mistake doctrine". If the law was that unclear with respect to our points, such as the assertion that the Death on the High Seas Act applies to accidents occurring in the territorial waters of foreign nations, then decisions which came down after the

appeal time had run and which did clarify such law, obviously dictate Rule 60b relief under the Lairsey doctrine. The best example is the district court's holding that claims under DOHSA (Death on the High Seas Act, 46 U.S.C. §761, et seq.) were not available to Petitioners because the accidents occurred "in the territorial waters of Singapore" and "not on the high seas". A few days after the appeal time in this case expired, the Fifth Circuit, in Sanchez v. Loffland Bros., 626 F.2d 1228 (5th Cir. 1980), cert. den. 101 S.Ct. 3112, concluded otherwise. It affirmatively noted that there were numerous authorities holding that the Death on the High Seas Act does apply within the territorial waters of a foreign country. Even though the district court considered the general maritime claim, for choice-of-law purposes, a separate determination of choice-of-law for the DOHSA claim is still necessary, for in

Romero v. International Terminal Operating Co., supra, the Supreme Court noted that "due regard must be had for the differing interests advanced by the varied aspects of maritime law . . ." (79 S.Ct. at p. 485). Most important, however, the erroneous conclusion of the district court that the Death on the High Seas Act did not apply in the territorial waters of Singapore precluded consideration by it of the unique mandate (unique in the sense that there is no similar expression or rule in the Jones Act or general maritime law) contained in 46 U.S.C. §764, discussed supra.

Clearly, then, in view of the post-appeal time decision in Heli Sanchez, clarifying Fifth Circuit law to the effect that the DOHSA statutes apply to accidents such as these, occurring in the territorial waters of other nations, the district court abused its discretion in failing to correct its judgment of July 31, 1981 to conform to the Heli Sanchez decision. If it had done so,

it would have, in view of 46 U.S.C. §764, at least denied the Defendants' forum non conveniens motion and adjudicated Plaintiffs' rights under Singapore law.

CONCLUSION AND PRAYER

We believe the granting of certiorari in this case is important for a very vital and overriding reason. That reason is that if this Court will grant certiorari and make it clear to the Fifth Circuit, and to all other circuits which might be tempted to change and narrow their views with respect to Rule 60b, that it expects, as expressed by Mr. Justice Harlan in Link v. Wabash, all district courts to correct their own mistakes under the Rule 60b procedure, rather than requiring the parties to resort to the time-consuming and expensive process of appeal, hundreds of hours of time on the part of the courts and lawyers and parties will be saved and a more streamlined judicial process, consistent with the

views expressed by Chief Justice Burger and other members of the Court, will be the result. If this Court will send the message to the Fifth Circuit and via the Fifth Circuit to the district courts in the United States that it is going to take a critical view of courts who hesitate and/or refuse to correct their own errors through the Rule 60b process, the district courts are going to be more inclined to face up to their own mistakes, correct them before an expensive and time-consuming appeal becomes necessary, and thus achieve a substantial economy of justice. We recognize that it is human nature on the part of judges, whether they be federal or state judges, to be reluctant to admit mistakes. If the position now taken by the Fifth Circuit, i.e., a hard and narrow view toward the Rule 60b procedure, is allowed to stand, district courts, in all probability, are going to be much less inclined to correct

their own mistakes. We fear that the Fifth Circuit in Alvestad and this case have unleashed a syndrome that will result in a greater number of appeals, will result in the virtual abandonment of the use of Rule 60b as a tool for achieving an economy of justice, and will further burden the district courts and the appellate courts in a manner inconsistent with the modern thinking of this Court and other enlightened judges.

And, of course, certainly as important as the policy considerations of an efficient judiciary is the fact that we have very substantial equitable and legal rights which are suffering from the hard line taken by the Fifth Circuit in Alvestad and Chick Kam Choo. As has been noted in a number of cases, it just does not seem right to visit upon the widows and children of Mr. Alvestad and the widows and children of the decedents in this case the sins of the lead counsel in the district court.

As the undisputed affidavits and evidence indicated in both Alvestad and this case, those counsel were not acting in bad faith; they simply made a mistake or were negligent in not seeing to it that a notice of appeal had been filed or that the case was in proper procedural order during the confusing time of the handing over of the case to new counsel in charge. For that one human failing, the widows in this case will not receive an adjudication upon the merits even though, as we have demonstrated above, the district court was clearly mistaken in its holdings and in the approach it took toward this case.

Thus, Petitioners pray the Court to grant certiorari and upon the granting of certiorari and hearing hereof reverse and remand this case to the Fifth Circuit and district court for a consideration of the appeal upon its merits and/or simply remand

to the district court for a trial upon the merits.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of June, 1983, three true and correct copies of the above and foregoing Petition for Certiorari were sent to James Patrick Cooney, Suite 3710, One Shell Plaza, Houston, Texas 77002, attorney for Respondents, by United States mail, postage prepaid.

BENTON MUSSLEWHITE

Appendix 1A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-78-477

Judge Gabrielle K. McDonald

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG...;

YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK...;

LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG

VS.

EXXON CORPORATION, ET AL

MEMORANDUM AND RECOMMENDATION:

This case involves three death claims from accidents aboard the tanker ESSO WILHELMSHAVEN ("Vessel"). The Vessel is documented in Liberia and is owned by Esso Tankers, Inc., a Liberian corporation which is a 100% indirectly owned affiliate of Exxon Corporation. The Vessel was managed under a marine service agreement

by Exxon International Company, an unincorporated division of Exxon Corporation. In March, 1977, the Vessel entered shipyard in Singapore for repair work pursuant to written contract between Exxon International and Sembawang Shipyard Ltd. On March 13, 1977, two shipyard workers were killed in a fire and explosion in an oil tank in the Vessel. On March 24, 1977, a third shipyard worker, while engaged in repair work on the Vessel, was injured and died after being struck in the head by a piece of falling metal.

Representatives of all three decedents have filed suit to recover under the Jones Act, the Death on the High Seas Act, the Texas Wrongful Death Statute, and the general maritime law of the United States. Representatives of the decedents in the explosion accident are also claiming under the Texas Survival Statutes, the Longshoremen's and Harbor Worker's Compensation Act, and for common law negligence and common

law/maritime law products liability.

Claim on the head injury case was filed as H-78-477. Claims on the explosion case were filed as H-78-628. The two cases have been consolidated in H-78-477.

Defendant Exxon Corporation has filed Motion for Partial Summary Judgment and to Dismiss under the doctrine of forum non conveniens. Responses, briefs and affidavits have been filed by the respective parties.

Explosion Accident

Plaintiff's decedents Teo Ho Aik and Koo Ming Kuang were welders employed by Roma Project Engineering Co. which provided workers to the Sembawang Shipyard for ships under repair at the shipyard, including the Vessel. On March 13, 1977, Aik and Kuang and a third Roma welder, Yip Lai Chee, were detailed by Roma's chargeman for the welding section to

perform welding work in Port Tank No. 3. At about 2:35 that afternoon there was fire and an explosion in the tank. Aik and Kuang were killed. Chee was knocked unconscious but recovered. After an inquest, the coroner in Singapore returned an open verdict as to the deaths of the two decedents. Plaintiff Loo Wee Sang is Kuang's representative. Yip Ong Chu is Aik's representative.

Falling Object Accident

Decedent Leong Chang was a shipwright employed by Sembawang Shipyard. On March 24, 1977, he had been sent to the lower engine room of the Vessel for repair work. In the ship's machine shop above the engine room, Nicolo Prezioso, member of the ship's crew, was working on a valve spindle. The spindle was dislodged, rolled across the deck and fell through an open access hatch above the lower engine room. While no one saw the spindle strike Chang, a worker

nearby heard a thud and turned to see Chang lying face down on the deck with the spindle and his helmet near him. Chang later died in the hospital. The autopsy report certified cause of death as contused brain due to fractured skull. After the inquest, the coroner found that Prezioso was not criminally negligent for Chang's death. Chick Kam Choo is this decedent's representative.

Jones Act

The Jones Act, 46 USCA, paragraph 688 provides:

> "Any seaman who shall suffer personal injury in the course of his employment may...maintain an action for damages at law ... and in case of death of any seaman as a result of any such personal injury the personal representative... may maintain an action...."

The Jones Act does not define the term "seaman." To qualify as a Jones Act seaman, the injured worker must be able to show that he was assigned permanently to or performed a substantial part of his

work on a vessel, and that his duties contributed to the function of the vessel or to the accomplishment of its mission, or to its operation or welfare in terms of its maintenance. Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959). It is clear that the decedents fail to meet the first requirement of Robison. They were not permanently assigned to the Vessel nor to perform a substantial part of their duties on this Vessel. Decedents were shipyard workers assigned by the yard for repairs or work on any vessel in the yard. Their relationship to this Vessel was only transitory. In Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960), the Court held that a welder on a barge, who worked under essentially the same conditions as presented in this case, was not a seaman. Thibodeaux is controlling. While the question of deciding who is a seaman may raise a question of fact for

for a jury, if there is no genuine factual dispute to be resolved, reference to the jury is not necessary. Owens v. Diamond M Drilling Co., 487 F.2d 74 (5th Cir. 1973). Summary judgment may properly be granted when there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman. Billings v. Chevron, USA, Inc., ___F2d___ (5th Cir., No. 79-3173, June 9, 1980). Under the Robison test and the evidence presented, this magistrate finds no basis to support Plaintiff's contention that their decedents were seaman.

Further, the Jones Act by its terms requires an employer-employee relationship. Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975). Two of the decedents were employees of Roma and one was an employee of Sembawang Shipyard. There is no evidence of any control by Defendants over these workers to justify a "borrowed

"employee" status. Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969).

Claims under the Jones Act are not available to Plaintiffs.

Death on the High Seas Act (DOHSA)

DOHSA, 46 USCA, par. 761, et seq., by its title and by its terms, applies to deaths occurring on the high seas. The accidents resulting in the deaths of the decedents occurred in territorial waters of Singapore, not on the high seas.

Claims under DOHSA are not available to Plaintiffs.

Longshoremen's and Harbor Worker's Compensation Act

Coverage provided by this Act is limited to a situation where "disability or death results from an injury occurring upon the navigable waters of the United States." 33 USCA, par. 903(a). Since the accidents occurred in Singapore waters, claims under this Act are not available to Plaintiffs.

General Maritime Law, Texas Statutes, Other Claims and Forum Non Conveniens

Since the issue in these subjects involves determining the applicable law, they may be considered together. Lauritzen[1] and Rhoditis[2] set forth eight factors generally considered in determining the choice of law in a maritime context. Gulf Oil Company v. Gilbert[3] is the leading case on the doctrine of forum non conveniens. The criteria have not been limited to the particular subject but have been considered in both types of cases.

Lauritzen-Rhoditis analysis must first be made to determine whether application of United States general maritime law is warranted in this case. Defendants

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[1] Lauritzen v. Larson, 345 US 571, 73 S.Ct. 921, 3 L.Ed2 368; reh. denied 359 US 962, 79 S.Ct. 795, 3 L.Ed2d 769 (1959).

[2] Hellenic Lines Ltd. v. Rhoditis, 398 US 306, 90 S.Ct. 1731, 26 L.Ed2d 252; reh. denied 400 US 856, 91 S.Ct. 23 (1970).

[3] 330 US 501, 67 S.Ct. 839, 91 L.Ed 1055 (1947).

have briefed the issue in detail under each of the eight factors, and Plaintiffs have filed brief in opposition. Review of all the cases cited need not be made here. Of the eight factors, only two point toward American law, the allegiance of the defendant shipowner and the base of operations. The Vessel is owned by an affiliate of Exxon, and the headquarters of Exxon is in Houston. The other contacts in this controversy substantially involve Singapore. It is the conclusion of this magistrate that the contacts do not warrant the application of general maritime law of the United States to otherwise foreign transactions.

With the conclusion that statutory and maritime law of the United States should not be applied, determination should then be made whether dismissal is warranted under the doctrine of forum non conveniens. The issue has also been briefed by both parties. On one hand

Plaintiffs' choice of forum has been in this Court and Defendant Exxon Corporation's principal place of business is here. On the other, the accidents occurred in Singapore; Plaintiffs are residents in Singapore, as were their decedents; the decedants were employed in Singapore by Singapore businesses to work there; most witnesses are in Singapore; and there are legal remedies available through the courts in Singapore. Defendants further contend that retention of jurisdiction here would cause an injustice in that Defendants could not seek contractual indemnification from the shipyard. It is this magistrate's conclusion that dismissal is appropriate.

Accordingly, it is RECOMMENDED that Defendant's Motion for Summary Judgment be GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime law of the United States.

It is RECOMMENDED that Defendants' Motion to Dismiss under the doctrine of forum non conveniens be GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense relating to any statute of limitation, and consent to satisfy any judgment rendered by said court.

The Clerk will file this instrument and transmit a copy to each party or counsel. Within ten days after receipt of the copy, a party may file with the Clerk, and serve on all parties, written objections, pursuant to Local Rule 24 and 28 USC §636(b) (1) (C).

Done at Houston, Texas, this 18th day of June, 1980.

S/H. Lingo Platter
H. LINGO PLATTER
UNITED STATES MAGISTRATE

Appendix 1B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-78-477

Judge Gabrielle K. McDonald

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG...;

YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK...;

LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG

VS.

EXXON CORPORATION, ET AL

ORDER OF DISMISSAL

The Court has reviewed the United States Magistrate's Memorandum and Recommendation, Objections of Plaintiffs, and Defendants' Response to Objections. It is ORDERED that said Memorandum and Recommendation be and the same is hereby accepted and adopted as the Court's Memorandum and Order.

It is therefore ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment is GRANTED as to Plaintiffs' claim

under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Workers Compensation Act, and the general maritime law of the United States.

It is further ORDERED, ADJUDGED and DECREED that Defendants' Motion to Dismiss under the doctrine of forum non conveniens is GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense relating to any statute of limitation, and consent to satisfy any judgment rendered by said court.

The Clerk will enter this Order and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of July, 1980.

S/Gagrielle K. McDonald
UNITED STATES DISTRICT JUDGE

Appendix 1C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. NO. H-78-477

CHICK KAM CHOO, Individually and as Representative of the Estate of LEONG CHONG...;

YIP ONG CHU, Individually and as Representative of the Estate of TEO HO AIK...;

LOU WEE SANG, Individually and as Representative of the Estate of KOO MING KUANG

VS.

EXXON CORPORATION, ET AL

FINAL JUDGMENT

From a consideration of the pleadings submitted in this case, it is the opinion of this Court that this action should be and is hereby DISMISSED, without prejudice.

The Clerk will enter this Final Judgment and provide all parties with a true copy.

Done at Houston, Texas, this 31st day of July, 1980.

S/Gabrielle K. McDonald
GABRIELLE K. McDONALD,
UNITED STATES DISTRICT JUDGE

Appendix 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-78-477
Consolidated With
H-78-628

CHICK KAM CHOO, ET AL.,
Plaintiffs,

V.

EXXON CORPORATION, ET AL.,
Defendants.

MINUTE ENTRY

Pending before the Court is the Plaintiffs' Motion for Relief Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The parties were allowed to present oral arguments in support of and opposition to this motion on October 5, 1981. Having considered the parties' arguments, memoranda, affidavits and exhibits, the Court hereby makes the following ruling: plaintiffs' Motion for Relief, and their Request for Reinstatement Pursuant to Rule 60(b) is DENIED on the ground that it is the opinion of this Court

that the plaintiffs are seeking Rule 60(b) relief as a substitute for appeal; the plaintiffs have shown no special equities entitling them to be relieved of the judgment; and the Court committed no mistake of law, within the meaning of Rule 60(b), in dismissing this case on July 31, 1980. Defendants are hereby directed to prepare a proposed order with citations of authorities.

The Clerk shall file this Minute Entry and provide a true copy to counsel for all parties.

DONE at Houston, Texas, this 8th day of December, 1981.

S/ Gabrielle K. McDonald
GABRIELLE K. McDONALD
UNITED STATES DISTRICT JUDGE

Appendix 3

CHICK KAM CHOO, et al.;
Plaintiffs-Appellants,

v.

EXXON CORPORATION, et al.,
Defendants-Appellees.

No. 82-2015

Summary Calendar.

United States Court of Appeals
Fifth Circuit.

Jan. 24, 1983.

Rehearing and Rehearing En Banc
Denied March 11, 1983.

Plaintiffs whose claims were summarily dismissed filed motion for relief from final judgment on basis of attorney inaction and mistake. After the United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., denied relief, and plaintiffs appealed, the Court of Appeals, Tate, Circuit Judge, held that district court did not abuse its discretion in denying plaintiffs relief, because alleged attorney errors were not blatant, and allegedly mistaken rulings were not so obviously incorrect as to be

fundamentally misconceived.

Affirmed.

1. Federal Civil Procedure. Key #2642

Appeal under Federal Rule of Civil Procedure providing that court may relieve party from final judgment may not be used as substitute for ordinary process of appeal once time for such has passed, particularly where mistakes of law are alleged as primary grounds for appeal. Fed.Rules Civ. Proc.Rule 60(b),28 U.S.C.A.

2. Federal Civil Procedure. Key #2656

District court, after summarily dismissing plaintiffs' claims under, inter alia, Jones Act and Longshoremen's and Harbor Workers' Compensation Act, did not abuse its discretion in denying plaintiffs relief, after time for appeal had passed, under Federal Rule of Civil Procedure providing that a court may relieve a party from a final judgment for, inter alia, mistake, inadvertence, surprise, or excusable neglect, on basis of attorney

inaction and mistake, because alleged attorney errors were not blatant, and because allegedly mistaken rulings were not so obviously incorrect as to be fundamentally misconceived. Jones Act, 46 U.S.C.A. Section 688; Longshoremen's and Harbor Workers' Compensation Act, Section 1 et seq., 33 U.S.C.A. Section 901 et seq.; Fed.Rules Civ. Proc.Rule 60(b), 28 U.S.C.A.

Benton Musslewhite, Houston, Tex. for plaintiffs-appellants.

James P. Cooney, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RANDALL, and TATE, Circuit Judges.

TATE, Circuit Judge:

Twelve weeks after summary judgment was entered dismissing their claims, the

plaintiffs filed a motion for relief from the final judgment because allegedly, (a) there was a serious mistake of law that did not come to their counsel's attention until more than thirty days after the final judgment and (b) there was excusable neglect because the legal associate in charge of the litigation for the plaintiffs had left the firm and remaining counsel, embroiled in antitrust litigation in Pennsylvania, did not discover the mistake until some two months after the final judgment. Finding no excusable neglect and, further, that the issues decided by the judgment were thoroughly considered in an adversary context, and that error, if any, was not so fundamentally incorrect as to implicate Rule 60(b) relief, we find no abuse of the district court's discretion in denying such relief and, accordingly, affirm.

Facts

These consolidated cases arose out of

two fatal accidents aboard the M/S ESSO WILHELMSHAVEN which killed three non-American Singapore shipyard workers in March 1977 while the vessel underwent extensive maintenance and repair work in a Singapore shipyard. Causes of action founded upon the Jones Act, 46 U.S.C. Section 688, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Section 901 et. seq., the Death on the High Seas Act, 46 U.S.C. Section 761 et. seq., general maritime law, and the Wrongful Death and Survival statutes of Texas, Tex.Rev.Civ.Stat.Ann. arts. 4671-4678, and 5525, were brought by the widows and/or children of the decedents against Esso Tankers, Inc. (the Liberian corporation which owns the Liberian registered ESSO WILHELMSHAVEN), Exxon International Company (an unincorporated division of Exxon Corporation charged under a vessel management agreement with responsibility for all aspects of the vessel's day-to-day

operations), and Exxon Corporation (a Delaware corporation headquartered in Houston, Texas). Adopting the logic and conclusions of a magistrate's memorandum and report as its own, the district court dismissed the plaintiffs' suit, finding on summary judgment:

(1) that none of the plaintiffs was a Jones Act "seaman", under the test articulated in Offshore Co. v. Robison, 266 F.2d 769 (5th Cir.1959) and its progency, entitled to invoke the Jones Act;

(2) that LHWCA could not be invoked as a basis for suit since the Act was restricted to the navigable waters of the United States, and both accidents took place in Singapore;

(3) that DOHSA, "by its title and by its terms" applied only to accidents occurring "on the high seas" and not to deaths that "occurred in territorial waters of Singapore";

(4) that general maritime law of the

United States would not be applicable to the case since the accidents lacked adequate "Lauritzen-(Romero) Rhoditis analysis"[1] contacts; and

(5) that a forum non conveniens[2] dismissal was appropriate since Singapore's

1. See Lauritzen v. Larsen, 345 U.S. 571, S.Ct. 921, 97 LEd. 1254 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed2d 769 (1959); and Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed2d 252 (1970). Discussed in Fisher v. Agio Nicholaos V, 628 F.2d 308 (5th Cir.1980) and Chiazor v. Transworld Drilling, Inc., 648 F.2d 1015(5th Cir.1981), cert.denied, 455 UlS. 1019, 102 S.Ct. 1714, 72 L.Ed2d 136.

2. See Gulf Oil v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed 1055 (1947), and Fisher and Chiazor, supra note 1.

would be the controlling law, Singapore was the site of the accident, was the residence of most of the plaintiffs and witnesses, and could provide an adequate forum. The magistrate further concluded that Exxon could not assert its contractual indemnity rights against the Singapore shipyard in a United States action, presumably because of a lack of personal jurisdiction over the shipyard.

Judgment was entered on July 31, 1980 against the plaintiffs, and their action was dismissed. No timely appeal was taken. This was allegedly caused, at least in part, by miscommunications that arose between the two law firms representing the plaintiffs (subsequent to consolidation and following the departure from her firm and withdrawal from the case of the associate initially in charge); which caused them to erroneously evaluate the strength of their case on appeal. Approximately twelve weeks later, after reevalua-

ting their position, counsel for the plaintiffs sought reconsideration, pursuant to Fed.R.Civ.Pro. 60(b), by the district court of its July 31, 1980 order of dismissal. After a hearing, relief was refused, and this appeal followed.

I

(1) However persuasive the plaintiffs' assertions of legal error might have been on a direct appeal, timely taken, our review of the plaintiffs' appeal in its present procedural posture is strictly limited to determination whether the district court's denial of Rule 60(b) motion constituted an abuse of discretion. Alvestad v. Monsanto Co., 671 F.2d 908, 912 (5th Cir.1982); Seven Elves v. Eskenazi, 635 F.2d 396, 402 (5th Cir.1981). As we have stressed before, a Rule 60(b) appeal may not be used as a substitute for the ordinary process of appeal once the time for such has passed, particularly

where, as here, mistakes of law are alleged as the primary grounds for the appeal.

Rule 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly dicovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective

application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1),(2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed.R.Civ.P.60(b).

With regard to the "excusable neglect" contention, a leading commentator has pointed out:

(A) party cannot have relief under Rule 60(b)(1) merely because he is unhappy with the judgment. Instead he must make some showing of why he was justified in failing to avoid mistake or inadvertence. Gross carelessness is not enough. Ignorance of the rules is not enough, nor is ignorance of the law....

11 Wright and Miller, Federal Practice and Procedure, Section 2858 at p. 170.

With regard to the "mistake" in the ruling as a ground for 60(b) relief, the same

commentator quotes with approval jurisprudential and doctrinal commentary that the remedy is "'addressed to special situations justifying extraordinary relief, (where)...the mistake was attributable to special circumstances'", not simply "'that the court made an erroneous ruling'", id. at p. 177, and that the judicial error should involve "'a fundamental misconception of the law'" as distinguished merely from a merely erroneous ruling, id. at p. 178.

(2) In the present instance, the attorney inaction and the reasons relied upon are far from the type of excusable neglect previously recognized as a basis for reopening a final judgment. As to the "mistake", the rulings on (3) and (4), for instance, present issues that arguably could have been decided otherwise on appeal, but they do not present rulings so obviously incorrect as to constitute a fundamentally misconceived ruling such as, for instance, one that overlooks controlling statute of case law.

Even if it were within the district court's discretion to reopen its judgment on the basis of these errors of law alleged by the plaintiffs, if errors they were, we cannot conclude in the present context that the court's failure to do so was an abuse of its discretion.

In Alvestad, supra, the widow of a Norwegian diver, killed in the North Sea while working under a contract between his employer and a United Kingdom corporate subsidiary of an American corporation, similarly opposed a forum non conveniens dismissal of her action in the context of a Rule 60(b) appeal. She urged, as do the plaintiffs here, that the application of choice-of-law and forum non conveniens analysis by the district court was erroneous "clear(ly) and beyond question". Alvestad, supra, 671 F.2d at 913. Rejecting Rule 60(b) appeals as a suitable means for challenging alleged errors of law of this substantive nature, we stated, sum-

marizing prior authority:

Without reaching the merits of these contentions, we do not regard Rule 60(b) as an appropriate avenue for relief from judicial mistakes of this kind. The Fourth Circuit in Compton (v. Alton Steamship Co. 608 F.2d 96(4th Cir.1979)) undeniably construed Rule 60(b) as providing for relief from legal errors committed by a trial court. However, it referred only to situations in which "the mistake was clear on the record, and involved a plain misconstruction of the statute on which the action was grounded...." 608 F.2d at 104. Our own decision in Meadows v. Cohen, 409 F.2d 750 (5th Cir.1969), quoted extensively in Compton, held a district court to have abused its discretion in not granting a Rule 60(b) motion for relief from a judgment "which was clearly at variance with the plain wording" of a federal statute. Id. at 753.

While we thus have admonished district courts that they should honor requests to reform a judgment in obvious conflict with a clear statutory mandate, we have been equally insistent that Rule 60(b) is not a substitute for the ordinary method of redressing judicial error-appeal. In its origins, Rule 60(b) "represents an effort to codify the equitable practice with respect to the correction of judgments after the time for appeal has expired." Lafferty v. District of Columbia, 277 F.2d 348, 351 n. 6(D.C.Cir.1960). It is not a means for postponing or escaping that expiration.

In Gary W. v. Louisiana, 622 F.2d 804 (5th Cir.1980), cert. denied, 450 U.S. 994, 101 S.Ct. 1695, 68 L.Ed.2d 193 (1981), appellants who had neglected to appeal an award of attorneys' fees against them sought relief from the judgment through a Rule 60(b) motion. On appeal from the district court's denial of their motion,

appellants maintained that this denial was an abuse of discretion because the court had committed the "mistake" of applying the wrong legal standard. "(E)ven if the trial court had misapplied an incorrect legal standard when assessing legal fees," we observed in affirming the denial, "the proper way to challenge its ruling in the court of appeals is by appeal of its ruling, not by appeal of a denial of a Rule 60(b) motion." 622 F.2d at 805 (footnote omitted).

Similarly, in Fackelman v. Bell, 564 F.2d 734 (5th Cir.1977), this court rebuffed an appellant's effort, to use Rule 60(b) to reopen an adverse judgment on the ground that the district court had erroneously interpreted the Freedom of Information Act:

> All of these mistakes, if mistakes they be, are mistakes of law and could have been raised on appeal. The law of this Circuit permits a trial judge, in his

> discretion, to reopen a judgment on the basis of an error of law.... But such reopenings are certainly not mandatory. The orderly process of appeal usually is far more appropriate to deal with such errors.

564 F.2d at 736.

Alvestad, supra, 671 F.2d at 912-913.

Unlike Seven Elves, supra, upon which the plaintiffs primarily rely, the disposition of the present case was not rendered in an effectively ex parte context. The arguments in favor and opposition to the exercise of jurisdiction over the plaintiffs' actions were here thoroughly aired below, before the magistrate, in a subsequent oral argument before the district court, and finally in the Rule 60(b) motion and hearing. While the merits of the underlying claim may have not been reached and tried, the merits of the defendants' jurisdictional defenses have been thoroughly considered in an adversarial context.

Whether we would have reached the conclusion reached by the district court we need not consider. It will suffice to say that if it was wrong, it was not obviously so in a manner now remediable in a Rule 60(b) appeal.

While an attorney's blatant errors will not necessarily be permitted to visit manifest injustice on his innocent client, the alleged attorney errors here are not blatant and the alleged injustice is far from self-evident. In contrast to Seven Elves (where a binding $250,000 final judgment was entered against the defendants without their receiving any effective prior notice of the proceeding scheduled to adjudicate the claims against them, and without any appearance by the defendants themselves or counsel on their behalf from the time pleadings were first filed until an attempt was made to execute the judgment), the plaintiffs here have been vigorously represented

by counsel, especially on the jurisdictional issue they unsuccessfully opposed, throughout the course of these proceedings. The fact that counsel might have been more inclined to take a timely appeal after a more thoughtful or more thorough review of case files and case law he failed to consult sooner, does not constitute the sort of "excusable neglect" previously recognized as a basis for Rule 60(b) relief. Here, at most, the attorney's failure to appeal was a result of misjudgment or careless failure to evaluate the possibilities of an arguable appeal, rather than the type of malfeassance by an attorney that results in such dire consequences for his client that justice requires the courts to step in and correct the situation.

Similarly, even if, as the plaintiffs contend with regard to the forum non conveniens issue, the workmens' compensation scheme of Singapore presents Singapore's injured harborworker with a hobson's

choice between an arguably inadequate (but prompt and certain) compensation award and the uncertainty and delay of an action at tort, it seems in this regard to do no more, no more unjustly, than any workmen's compensation system. We cannot, on this basis alone, conclude that relegating the plaintiffs to their home jurisdiction to pursue such remedies as are there available to them (upon the express condition that the defendant will satisfy any judgment which may there result), is facially unjust and cognizable in the context of a Rule 60(b) appeal. If the compensation available to Singapore's injured shipyard workers is inadequate, it is a matter more for the considered judgment of the legislators of Singapore than for this appellate court.

Accordingly, the judgment below is AFFIRMED.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 82-2015
Summary Calendar

D. C. Docket No. CA-H-78-477 and
CA-H-78-628

CHICK KAM CHOO, ET AL.
Plaintiffs-
Appellants,

versus

EXXON CORPORATION, ET AL.
Defendants-
Appellees.

Appeal from the United States District
Court for the Southern District
of Texas

Before GEE, RANDALL and TATE,
Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 24, 1983

ISSUED AS MANDATE: March 21, 1983

Appendix 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-2015
Summary Calendar

CHICK KAM CHOO, ET AL.,

Plaintiffs-Appellants,

versus

EXXON CORPORATION, ET AL.,

Defendants-Appellees.

- - - -

Appeal from the United States District Court
for the Souther District of Texas

- - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 24, 5 Cir., 1983 ____ _____ __ F.2d_____).

(March 11, 1983)

Before GEE, RANDALL and TATE, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc,

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/Albert Tate
United States Circuit Judge

Appendix 5 (a)

lowed by this section, and in such cases the consul-general was authorized to exercise some reasonable discretion in determining this extra allowance, in reference to actual or anticipated ill treatment. 1898, 22 Op.Atty.Gen. 212.

8. Passage home

Where all seamen found employment on other vessels, no allowance would be made for their passage home, but they would be awarded wages to time they left vessel, with $10 each as general damages for breach of contract. Papping v. The Sirius, D.C.Cal.1891, 47 F. 825.

9. Contractual nature of wage claim

A wage claim is based upon a contract of employment. Jernigan v. Lay Barge Delta Five, D.C.Tex.1949, 296 F.Supp. 127. Affirmed 423 F.2d 1327.

Duty to pay wages is an obligation that can only arise from employer-employee relationship. Id.

10. Burden of proof

Where an American seaman is discharged by the master in a foreign port, he may recover, in a libel for wages, the advance authorized if the same be not paid to the consul abroad to be distributed according to this section and the onus probandi is on the master to show that the advance was paid. Orne v. Townsend, C.C.Mass.1827, 4 Mason 541, Fed.Cas.No.10,583.

11. Evidence

Evidence justified denial of recovery by assistant engineer for wages allegedly due for balance of sea voyage after he left ship on the ground that the life or physical safety of the engineer were not endangered by threats of the ship's master and that differences between the parties were of a petty nature. Rogers v. Pacific-Atlantic S. S. Co., C.A.Or.1948, 170 F.2d 30.

12. Direction of verdict

In action for wages by seaman who deserted ship in foreign port for alleged cruel treatment, unsupported incredible testimony of seaman required direction of verdict for defendant. Ennis v. Waterman S. S. Corporation, D.C.N.Y.1943, 49 F.Supp. 685.

In action for wages by seaman who deserted ship in foreign port for alleged cruel treatment, in absence of evidence as to amount paid for seaman's return passage to United States, court in directing verdict for defendant could not direct judgment in its favor on counterclaim for passage money paid. Id.

In action for wages by seaman who deserted ship in foreign port for alleged cruel treatment, where unsupported testimony of seaman was so incredible that a verdict in his favor would have necessarily been set aside and judgment entered for defendant, fact that jury failed to agree did not change duty of court to grant defendant relief. Id.

§§ 686, 687. Repealed. Oct. 9, 1940, c. 784, § 1, 54 Stat. 1058

Historical Note

Sections, R.S. §§ 4588, 4591, related to certificates of citizenship for seamen.

Validity of Certificates of Citizenship Issued Prior to Repeal. Section 2 of Act Oct. 9, 1940, repealing these sections, provided as follows: "All certificates heretofore issued to seamen under the authority of section 4588 of the Revised Statutes of the United States (section 686 of Title 46) are hereby declared void."

§ 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such sea-

man may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

Historical Note

References in Text. "Statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees" and "statutes of the United States conferring or regulating the right of action for death in the case of railway employees", referred to in text, are a reference to the Federal Employers' Liability Act, which is classified to section 51 et seq. of Title 45, Railroads.

Codification. As originally enacted, this section read: "In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority."

Act June 5, 1920 amended this section to read as set forth above.

Amount in Controversy. Jurisdictional amount increased from $3,000 to $10,000 in diversity of citizenship cases and in cases arising under the Constitution, laws, or treaties of the United States, see sections 1331 and 1332 of Title 28, Judiciary and Judicial Procedure.

TREATIES

Bilateral Treaties of Friendship, Commerce and Navigation with foreign countries accord aliens right to access to United States courts and define "access" as comprehending, among other things, "legal aid and security for costs and judgments".

Country	Date Signed	Entered into Force	Citation
China	Nov. 4, 1946	Nov. 30, 1946	63 Stat. 1299
Ethiopia	Sept. 7, 1951	Oct. 8, 1953	4 UST 2134
Germany (Fed.Rep.)	Oct. 29, 1954	July 14, 1956	TIAS 3593
Greece	Aug. 3, 1951	Oct. 13, 1951	5 UST 1829
Ireland	Jan. 21, 1950	Sept. 14, 1950	1 UST 785
Israel	Aug. 23, 1951	Apr. 3, 1954	5 UST 550
Italy	Feb. 2, 1948	July 26, 1949	63 Stat. 2255
Japan	Apr. 2, 1953	Oct. 30, 1953	4 UST 2063

Library References

Seamen ⟸29. C.J.S. Seamen § 188 et seq.

West's Federal Forms

Allegations,
Jurisdiction, see § 1170.
Venue, see § 1096.
Complaint, see §§ 1997 to 1999, 11007, 11009, 11011, 11013 to 11015, 11023, 11027 to 11029, 11031.
Demand for jury trial, see § 11626.
Parties, pleading capacity of, see § 11241.

Code of Federal Regulations

Duties of consular officers,
Deceased seamen and effects, see 22 CFR 85.1 et seq.
Relief of seamen, see 22 CFR 84.1 et seq.

Appendix 5(b)

CHAPTER 21—DEATH ON HIGH SEAS BY WRONGFUL ACT

Sec.

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Mar. 30, 1920, c. 111, § 1, 41 Stat. 537.

Cross References

Death of plaintiff pending action, see section 765 of this title.

Library References

Admiralty ⇐21.
Death ⇐7 et seq.

C.J.S. Admiralty §§ 74 to 82
C.J.S. Death §§ 13, 27.

West's Federal Forms

Complaint, see § 11023.

Notes of Decisions

Appendix 5(C)

this section, since such amendment would not set up a different state of facts as grounds of action and would result in a change in form only and not in substance. Fornaris v. American Sur. Co. of N. Y., D.C.Puerto Rico 1960, 183 F.Supp. 338.

Where libel showed that libelants were barred by two year period of limitations prescribed by this section, court would grant leave to amend to show facts sufficient to excuse failure timely to file under exception providing that period is tolled if there is not reasonable opportunity for securing jurisdiction of vessel or corporation sought to be charged. Dunn v. Wheeler Shipbuilding Corp., D.C.N.Y. 1949, 86 F.Supp. 659.

Where plaintiffs, in action for death of seaman, stated an election to sue under Jones Act, section 688 of this title, election did not preclude an amendment made after running of two-year statute of limitations seeking alternative recovery under section 761 of this title, since amendment did not set up new cause of action and original election related only to choice to seek a trial by jury. Batkiewicz v. Seas Shipping Co., D.C.N.Y. 1943, 53 F.Supp. 802.

11. Laches

Where action was brought in 1964 under this chapter, which provided a two-year limitation, but action was dismissed for plaintiff's failure to answer interrogatories, and vacation of dismissal was denied in December, 1967, and second action was instituted in May, 1968, for death, which occurred in 1962, and plaintiff's counsel, on appeal from dismissal of second action, failed to file memorandum requested by court on issue whether action could be maintained under general maritime law as to unseaworthiness, laches barred claim. McGlenon v. Boeing Co., C.A.Cal.1971, 437 F.2d 433.

App. 5-(C)

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

Mar. 30, 1920, c. 111, § 4, 41 Stat. 537.

Library References

Death ⟨⟩8. C.J.S. Death § 28.

West's Federal Forms

Allegation of foreign law, see § 11256 et seq.

Notes of Decisions

Generally 3
Amendment of pleadings 8
Construction
  Generally 1
  With other laws 2
Election of remedies 4
Limitation of liability 5
Pleadings
  Generally 7
  Amendment 8
Review 9
Time to sue 6

1. Construction

The word "may" as used in this section should be construed as "mandatory" and not permissive. Egan v. Donaldson Atlantic Line, D.C.N.Y.1941, 37 F.Supp. 909.

2. Construction with other laws

Where claim for death of aircraft passenger was against Venezuelan carrier, and additional damages for conscious pain and suffering and mental distress were allowable under Venezuelan law, upholding of libellants' allegations with respect thereto would present no conflict with pecuniary damage claim allowable under section 761 of this title. Noel v. Linea Aeropostal Venezolana, D.C.N.Y.1968, 280 F.Supp. 1002.

Appendix 5(d)

Constitution of the United States and laws of Congress". Machine Tool & Equipment Corporation v. Reconstruction Finance Corporation, C.C.A.Or.1942, 131 F.2d 547.

Former section 41(1) of this title providing that federal district court should not have cognizance of suit on note in favor of assignee or subsequent holder if note be payable to bearer and not made by corporation, unless suit might have been prosecuted in such court if no assignment had been made, did not bar action on note by Reconstruction Finance Corporation, notwithstanding that original payee could not have sued on note in federal district court. Marks v. Reconstruction Finance Corporation, C.C.A.W.Va.1942, 129 F.2d 759.

While this section, providing that federal district court shall not have jurisdiction of corporations created by Act of Congress unless United States is owner of more than one-half of its capital stock is a limitation of jurisdiction rather than a grant of jurisdiction, failure to cite correct section of Federal Judicial Code in action by bank against Reconstruction Finance Corporation for breach of blanket participation agreement was immaterial where it was clear from face of complaint that federal jurisdiction existed. Central Nat. Bank in Chicago v. R. F. C., D.C.Ill.1955, 134 F.Supp. 873.

The federal district court would have original jurisdiction of an action brought against the Reconstruction Finance Corporation. Lew Morris Demolition Co. v. Metals Reserve Co., 1944, 51 N.Y.S.2d 297, 183 Misc. 237.

5. Disabled American Veterans

Since the United States does not own more than one-half of the capital stock of the Disabled American Veterans, fact that the organization was federally chartered by an Act of Congress does not create federal question jurisdiction in the federal courts. Rice v. Disabled Am. Veterans, D.C.D.C.1968, 295 F.Supp. 131.

15. Incorporated Indian tribes

Where plaintiff, a corporation, sued defendant in a state court and alleged that it was, and at all times had been, a corporation created, organized, and existing under an Act approved February 18, 1901, 31 Stat. 794, entitled "An Act to put in force in the Indian Territory certain provisions of the laws of Arkansas relating to corporations" and it appeared that plaintiff was organized as a corporation in the Indian country under the Arkansas laws made applicable thereto by such Act of Congress, plaintiff was a corporation existing under an Act of Congress, so that the action was one necessarily arising under and involving the Constitution and laws of the United States. Canary Oil Co. v. Standard Asphalt & Rubber Co., C.C.Kan.1909, 182 F. 663.

Fact that defendant Indian tribe was a federal corporation did not give federal district court jurisdiction to hear action for money due for electrical work performed on a tribal center complex. Enterprise Elec. Co. v. Blackfeet Tribe of Indians, D.C.Mont.1973, 353 F.Supp. 901.

16. State court jurisdiction

Though a corporation, incorporated under the provisions of an Act of congress, might have had adequate remedies in the state courts, it had a right to sue in the United States courts, and was not compelled to seek the jurisdiction of the state. First Nat. Bank v. Bohne, C.C.La. 1881, 8 F. 115.

app. 5(d)

1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

June 25, 1948, c. 646, 62 Stat. 934.

Historical and Revision Notes

Reviser's Note. Based on Title 28, U.S.C., 1940 ed., § 41(17) (Mar. 3, 1911, c. 231, § 24, par. 17, 36 Stat. 1093).

Words "civil action" were substituted for "suits," in view of Rule 2 of the Federal Rules of Civil Procedure.

Changes in phraseology were made.

Library References

Courts ⇐281, 298.
Federal Courts ⇐162, 194.

C.J.S. Federal Courts §§ 4(5), 27, 29.

Appendix 5(e)

Convention between the United States of America and other members of the International Labor Organization respecting shipowners' liability in case of sickness, injury, or death of seamen. Adopted by the General Conference of the International Labor Organization, twenty-first session, Geneva, October 24, 1936; ratification advised by the Senate of the United States, subject to understandings, June 13, 1938; ratified by the President of the United States, subject to the said understandings, August 15, 1938; ratification of the United States of America registered with the Secretary-General of the League of Nations October 29, 1938; proclaimed by the President of the United States September 29, 1939.

October 24, 1936
[T. S. No. 931]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Shipowners' Liability (Sick and Injured Seamen) Convention, 1936.
Preamble.

WHEREAS a draft convention (No. 55) with regard to the liability of the shipowner in case of sickness, injury, or death of seamen, was adopted on the twenty-fourth day of October nineteen hundred and thirty-six, by the General Conference of the International Labor Organization at its twenty-first session held at Geneva October 6–24, 1936, a certified copy of which draft convention, communicated by the Secretary-General of the League of Nations, acting in conformity with the requirements in the nineteenth Article of the Constitution of the International Labor Organization, to the Government of the United States of America as a Member of the said Organization, is, in the French and English languages, word for word as follows:

General Conference, International Labor Organization.

La Conférence générale de l'Organisation internationale du Travail,

The General Conference of the International Labour Organisation,

Convoquée à Genève par le Conseil d'administration du Bureau international du Travail, et s'y étant réunie le 6 octobre 1936 en sa vingt et unième session,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Twenty-first Session on 6 October 1936, and

Après avoir décidé d'adopter diverses propositions relatives aux obligations de l'armateur en cas de maladie, d'accident ou de décès des gens de mer, question qui est comprise dans le deuxième point à l'ordre du jour de la session,

Having decided upon the adoption of certain proposals with regard to the liability of the shipowner in case of sickness, injury or death of seamen, which is included in the second item on the Agenda of the Session, and

Après avoir décidé que ces propositions prendraient la forme d'un projet de convention internationale,

Having determined that these proposals shall take the form of a Draft International Convention,

Adoption of Draft Convention.

adopte, ce vingt-quatrième jour d'octobre mil neuf cent trente-six, le projet de convention ci-après qui sera dénommé Convention sur les obligations de l'armateur en cas de maladie ou d'accident des gens de mer, 1936:

adopts, this twenty-fourth day of October of the year one thousand nine hundred and thirty-six, the following Draft Convention which may be cited as the Shipowners' Liability (Sick and Injured Seamen) Convention, 1936:

ARTICLE 1.

ARTICLE 1.

Application.

1. La présente convention s'applique à toute personne employée à bord d'un navire, autre qu'un navire de guerre, immatriculé dans un territoire pour lequel la présente convention est en vigueur et qui effectue habituellement une navigation maritime.

1. This Convention applies to all persons employed on board any vessel, other than a ship of war, registered in a territory for which this Convention is in force and ordinarily engaged in maritime navigation.

Exceptions by national law or regulation permitted.

2. Toutefois, tout Membre de l'Organisation internationale du Travail pourra prévoir dans sa législation nationale telles exceptions qu'il estimerait nécessaires en ce qui concerne:

2. Provided that any Member of the International Labour Organisation may in its national laws or regulations make such exceptions as it deems necessary in respect of—

a) les personnes employées à bord:
   i) des navires appartenant à une autorité publique lorsque ces navires n'ont pas une affectation commerciale;
   ii) des bateaux de pêche côtière;
   iii) des bateaux d'une jauge brute inférieure à vingt-cinq tonneaux;
   iv) des bateaux en bois de construction primitive, tels que des "dhows" et jonques;

(a) persons employed on board,
   (i) vessels of public authorities when such vessels are not engaged in trade;
   (ii) coastwise fishing boats;
   (iii) boats of less than twenty-five tons gross tonnage;
   (iv) wooden ships of primitive build such as dhows and junks;

b) les personnes employées à bord pour le compte d'un employeur autre que l'armateur;

(b) persons employed on board by an employer other than the shipowner;

c) les personnes employées, exclusivement dans les ports, à la réparation, au nettoyage, au chargement ou au déchargement des navires;

(c) persons employed solely in ports in repairing, cleaning, loading or unloading vessels;

d) les membres de la famille de l'armateur;

(d) members of the shipowner's family;

e) les pilotes.

(e) pilots.

ARTICLE 2.

1. Les obligations de l'armateur doivent couvrir les risques:

a) de maladie ou d'accident survenus entre la date stipulée dans le contrat d'engagement pour le commencement du service et l'expiration de l'engagement;

b) de décès résultant d'une telle maladie ou d'un tel accident.

2. Toutefois, la législation nationale peut prévoir des exceptions:

a) pour l'accident qui n'est pas survenu au service du navire;

b) pour l'accident ou la maladie imputable à un acte intentionnel ou à une faute intentionnelle ou à l'inconduite du malade, du blessé ou du décédé;

c) pour la maladie ou l'infirmité dissimulée volontairement au moment de l'engagement.

3. La législation nationale peut prévoir que les obligations de l'armateur ne s'appliqueront pas en ce qui concerne la maladie, ni en ce qui concerne le décès imputable directement à la maladie, lorsque la personne employée a refusé de se soumettre à un examen médical au moment de l'engagement.

ARTICLE 3.

Aux fins de la présente convention l'assistance à la charge de l'armateur comprend:

a) le traitement médical et la fourniture des médicaments et autres moyens thérapeutiques de qualité et quantité suffisantes;

b) la nourriture et le logement.

ARTICLE 2.

1. The shipowner shall be liable in respect of— Liability of shipowner.

(a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement; Sickness and injury during term of employment.

(b) death resulting from such sickness or injury. Resultant death.

2. Provided that national laws or regulations may make exceptions in respect of: Exceptions by national law or regulation permitted.

(a) injury incurred otherwise than in the service of the ship;

(b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

(c) sickness or infirmity intentionally concealed when the engagement is entered into.

3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined. Refusal to be medically examined.

ARTICLE 3.

For the purpose of this Convention, medical care and maintenance at the expense of the shipowner comprises: Medical care and maintenance, scope.

(a) medical treatment and the supply of proper and sufficient medicines and therapeutical appliances; and

(b) board and lodging.

ARTICLE 4.

Period of liability.

1. L'assistance doit être à la charge de l'armateur jusqu'à guérison du malade ou du blessé, ou jusqu'à constatation du caractère permanent de la maladie ou de l'incapacité.

Limitation permitted.

2. Toutefois, la législation nationale peut prévoir que l'assistance à la charge de l'armateur sera limitée à une période qui ne pourra être inférieure à seize semaines à partir du jour de l'accident ou du début de la maladie.

Provisions where compulsory sickness insurance, etc., is in force.

3. En outre, s'il existe un système d'assurance-maladie obligatoire, un système d'assurance-accidents obligatoire ou un système de réparation des accidents du travail, qui soit en vigueur pour les marins dans le territoire où le navire est immatriculé, la législation nationale peut prévoir:

a) que l'armateur cessera d'être responsable à l'égard d'une personne malade ou blessée à partir du moment où cette personne a droit à l'assistance médicale en vertu du système d'assurance ou de réparation;

b) que l'armateur cessera d'être responsable, à partir du moment prescrit par la loi pour l'octroi de l'assistance médicale en vertu du système d'assurance ou de réparation aux bénéficiaires dudit système, même lorsque la personne malade ou blessée n'est pas elle-même couverte par ce système, à la condition qu'elle n'en soit pas exclue en raison de toute restriction visant particulièrement les

ARTICLE 4.

1. The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.

2. Provided that national laws or regulations may limit the liability of the shipowner to defray the expense of medical care and maintenance to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide—

(a) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to medical benefits under the insurance or compensation scheme;

(b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of medical benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not

travailleurs étrangers ou les travailleurs ne résidant pas sur le territoire où le navire est immatriculé.

ARTICLE 5.

1. Lorsque la maladie ou l'accident entraîne une incapacité de travail, l'armateur doit payer:

a) tant que le malade ou le blessé demeure à bord, la totalité du salaire;

b) à partir du débarquement, si le malade ou le blessé a des charges de famille, la totalité ou une partie du salaire selon les prescriptions de la législation nationale, jusqu'à guérison ou jusqu'à constatation du caractère permanent de la maladie ou de l'incapacité.

2. Toutefois, la législation nationale peut limiter la responsabilité de l'armateur quant au paiement de la totalité ou d'une partie du salaire à une personne débarquée à une période qui ne pourra être inférieure à seize semaines à partir du jour de l'accident ou du début de la maladie.

3. En outre, s'il existe un système d'assurance-maladie obligatoire, un système d'assurance-accidents obligatoire ou un système de réparation des accidents du travail qui soit en vigueur pour les marins dans le territoire où le navire est immatriculé, la législation nationale peut prévoir:

a) que l'armateur cessera d'être responsable à l'égard d'une personne malade ou blessée à partir du moment où cette personne a droit aux prestations en espèces en vertu du système d'assurance ou de réparation;

resident in the territory in which the vessel is registered.

ARTICLE 5.

Incapacity for work.

1. Where the sickness or injury results in incapacity for work the shipowner shall be liable—

(a) to pay full wages as long as the sick or injured person remains on board;

(b) if the sick or injured person has dependants, to pay wages in whole or in part as prescribed by national laws or regulations from the time when he is landed until he has been cured or the sickness or incapacity has been declared of a permanent character.

Limitation permitted.

2. Provided that national laws or regulations may limit the liability of the shipowner to pay wages in whole or in part in respect of a person no longer on board to a period which shall not be less than sixteen weeks from the day of the injury or the commencement of the sickness.

Provisions where compulsory sickness insurance, etc., is in force.

3. Provided also that, if there is in force in the territory in which the vessel is registered a scheme applying to seamen of compulsory sickness insurance, compulsory accident insurance or workmen's compensation for accidents, national laws or regulations may provide:

(a) that a shipowner shall cease to be liable in respect of a sick or injured person from the time at which that person becomes entitled to cash benefits under the insurance or compensation scheme;

b) que l'armateur cessera d'être responsable, à partir du moment prescrit par la loi pour l'octroi des prestations en espèces en vertu du système d'assurance ou de réparation aux bénéficiaires dudit système, même lorsque la personne malade ou blessée n'est pas elle-même couverte par ce système, à la condition qu'elle n'en soit pas exclue en raison de toute restriction visant particulièrement les travailleurs étrangers ou les travailleurs ne résidant pas sur le territoire où le navire est immatriculé.

b) that the shipowner shall cease to be liable from the time prescribed by law for the grant of cash benefits under the insurance or compensation scheme to the beneficiaries of such schemes, even when the sick or injured person is not covered by the scheme in question, unless he is excluded from the scheme by reason of any restriction which affects particularly foreign workers or workers not resident in the territory in which the vessel is registered.

ARTICLE 6.

Expense of repatriation.

1. L'armateur doit supporter les frais de rapatriement de tout malade ou blessé débarqué en cours de route par suite d'une maladie ou d'un accident.

1. The shipowner shall be liable to defray the expense of repatriating every sick or injured person who is landed during the voyage in consequence of sickness or injury.

Port to which return is effected.

2. Le port de rapatriement doit être:

a) ou le port d'engagement;

b) ou le port de départ du navire;

c) ou un port du pays du malade ou du blessé ou du pays dont relève le malade ou le blessé;

d) ou un autre port fixé par accord entre l'intéressé et le capitaine ou l'armateur, avec l'approbation de l'autorité compétente.

2. The port to which the sick or injured person is to be returned shall be—

(a) the port at which he was engaged; or

(b) the port at which the voyage commenced; or

(c) a port in his own country or the country to which he belongs; or

(d) another port agreed upon by him and the master or shipowner, with the approval of the competent authority.

Charges included in expense of repatriation.

3. Les frais de rapatriement doivent comprendre toutes dépenses relatives au transport, au logement et à la nourriture du malade ou du blessé pendant le voyage, ainsi que les frais d'entretien du malade ou du blessé jusqu'au moment fixé pour son départ.

3. The expense of repatriation shall include all charges for the transportation, accommodation and food of the sick or injured person during the journey and his maintenance up to the time fixed for this departure.

4. Si le malade ou le blessé est en état de travailler, l'armateur peut s'acquitter de la prestation de rapatriement à sa charge en lui procurant un emploi convenable à bord d'un navire se rendant à l'une des destinations prévues au paragraphe 2 du présent article.

Person capable of work.

4. If the sick or injured person is capable of work, the shipowner may discharge his liability to repatriate him by providing him with suitable employment on board a vessel proceeding to one of the destinations mentioned in paragraph 2 of this Article.

ARTICLE 7.

1. L'armateur doit supporter les frais funéraires en cas de décès survenu à bord, ou en cas de décès survenu à terre lorsqu'au moment de sa mort le décédé aurait pu prétendre à l'assistance à la charge de l'armateur.

Burial expenses.

2. La législation nationale peut prévoir le remboursement, par une institution d'assurance, des frais supportés par l'armateur, lorsque le système d'assurance sociale ou de réparation comporte une prestation pour frais funéraires.

Reimbursement by insurance institution.

ARTICLE 7.

1. The shipowner shall be liable to defray burial expenses in case of death occurring on board, or in case of death occurring on shore if at the time of his death the deceased person was entitled to medical care and maintenance at the shipowner's expense.

2. National laws or regulations may provide that burial expenses paid by the shipowner shall be reimbursed by an insurance institution in cases in which funeral benefit is payable in respect of the deceased person under laws or regulations relating to social insurance or workmen's compensation.

ARTICLE 8.

La législation nationale doit exiger de l'armateur ou de son représentant qu'il prenne des mesures afin de sauvegarder les biens laissés à bord par le malade, le blessé ou le décédé visé par la présente convention.

Safeguarding of personal property.

ARTICLE 8.

National laws or regulations shall require the shipowner or his representative to take measures for safeguarding property left on board by sick, injured or deceased persons to whom this Convention applies.

ARTICLE 9.

La législation nationale doit prévoir des dispositions en vue d'assurer une solution rapide et peu coûteuse des litiges auxquels peuvent donner lieu les obligations de l'armateur en vertu de la présente convention.

Settlement of disputes.

ARTICLE 9.

National laws or regulations shall make provision for securing the rapid and inexpensive settlement of disputes concerning the liability of the shipowner under this Convention.

ARTICLE 10.

L'armateur peut être exempté des obligations stipulées aux ar-

Exemption from certain liability.

ARTICLE 10.

The shipowner may be exempted from liability under Ar-

ticles 4, 6 et 7 de la présente convention dans la mesure où ces obligations seraient assumées par les pouvoirs publics.

ticles 4, 6 and 7 of this Convention in so far as such liability is assumed by the public authorities.

ARTICLE 11.

Equality of treatment.

La présente convention ainsi que les législations nationales, en ce qui concerne les prestations dues en vertu de la présente convention, doivent être interprétées et appliquées de manière à assurer l'égalité de traitement à tous les marins, sans distinction de nationalité, de résidence ou de race.

ARTICLE 11.

This Convention and national laws or regulations relating to benefits under this Convention shall be so interpreted and enforced as to ensure equality of treatment to all seamen irrespective of nationality, domicile or race.

ARTICLE 12.

More favorable agreements, etc., not affected.

Rien dans la présente convention n'affecte toute loi, toute sentence, toute coutume ou tout accord entre les armateurs et les marins qui assure des conditions plus favorables que celles prévues par la présente convention.

ARTICLE 12.

Nothing in this Convention shall affect any law, award, custom or agreement between shipowners and seamen which ensures more favourable conditions than those provided by this Convention.

ARTICLE 13.

Declarations respecting certain territories.

1. En ce qui concerne les territoires mentionnés par l'article 35 de la Constitution de l'Organisation internationale du Travail, tout Membre de l'Organisation qui ratifie la présente convention doit accompagner sa ratification d'une déclaration faisant connaître:

a) les territoires pour lesquels il s'engage à appliquer sans modifications les dispositions de la convention;
b) les territoires pour lesquels il s'engage à appliquer les dispositions de la convention avec des modifications, et en quoi consistent lesdites modifications;
c) les territoires pour lesquels la convention est inapplicable

ARTICLE 13.

1. In respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation, each Member of the Organisation which ratifies this Convention shall append to its ratification a declaration stating:

(a) the territories in respect of which it undertakes to apply the provisions of the Convention without modification;
(b) the territories in respect of which it undertakes to apply the provisions of the Convention subject to modifications, together with details of the said modifications;
(c) the territories in respect of which the Convention is in-

et, dans ces cas, les raisons pour lesquelles elle est inapplicable;

d) les territoires pour lesquels il réserve sa décision.

applicable and in such cases the grounds on which it is inapplicable;

(d) the territories in respect of which it reserves its decision.

2. Les engagements mentionnés aux alinéas a) et b) du premier paragraphe du présent article seront réputés partie intégrante de la ratification et porteront des effets identiques.

2. The undertakings referred to in sub-paragraphs (a) and (b) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

Declarations to be integral parts of ratifications.

3. Tout Membre pourra renoncer par une nouvelle déclaration à tout ou partie des réserves contenues dans sa déclaration antérieure en vertu des alinéas b), c) ou d) du paragraphe premier du présent article.

3. Any Member may by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of sub-paragraphs (b), (c) or (d) of paragraph 1 of this Article.

Subsequent cancellation of reservations.

ARTICLE 14.

Les ratifications officielles de la présente convention seront communiquées au Secrétaire général de la Société des Nations et par lui enregistrées.

ARTICLE 14.

The formal ratifications of this Convention shall be communicated to the Secretary-General of the League of Nations for registration.

Ratifications, registration.

ARTICLE 15.

1. La présente convention ne liera que les Membres de l'Organisation internationale du Travail dont la ratification aura été enregistrée par le Secrétaire général.

ARTICLE 15.

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Secretary-General.

Scope.

2. Elle entrera en vigueur douze mois après que les ratifications de deux Membres auront été enregistrées par le Secrétaire général.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Secretary-General.

Effective date.

3. Par la suite, cette convention entrera en vigueur pour chaque Membre douze mois après la date où sa ratification aura été enregistrée.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

ARTICLE 16.

Aussitôt que les ratifications de deux Membres de l'Organisation internationale du Travail auront

ARTICLE 16.

As soon as the ratifications of two Members of the International Labour Organisation have been

Notification to Members.

été enregistrées, le Secrétaire général de la Société des Nations notifiera ce fait à tous les Membres de l'Organisation internationale du Travail. Il leur notifiera également l'enregistrement des ratifications qui lui seront ultérieurement communiquées par tous autres Membres de l'Organisation.

registered, the Secretary-General of the League of Nations shall so notify all the Members of the International Labour Organisation. He shall likewise notify them of the registration of ratifications which may be communicated subsequently by other Members of the Organisation.

ARTICLE 17.

Denunciation.

1. Tout Membre ayant ratifié la présente convention peut la dénoncer à l'expiration d'une période de dix années après la date de la mise en vigueur initiale de la convention, par un acte communiqué au Secrétaire général de la Société des Nations, et par lui enregistré. La dénonciation ne prendra effet qu'une année après avoir été enregistrée.

Extension.

2. Tout Membre ayant ratifié la présente convention qui, dans le délai d'une année après l'expiration de la période de dix années mentionnée au paragraphe précédent, ne fera pas usage de la faculté de dénonciation prévue par le présent article sera lié pour une nouvelle période de dix années, et, par la suite, pourra dénoncer la présente convention à l'expiration de chaque période de dix années dans les conditions prévues au présent article.

ARTICLE 17.

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Secretary-General of the League of Nations for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

ARTICLE 18.

Reports at 10-year intervals.

A l'expiration de chaque période de dix années à compter de l'entrée en vigueur de la présente convention, le Conseil d'administration du Bureau international du Travail devra présenter à la Conférence générale un rapport sur l'application de la présente convention et décidera s'il y a lieu d'inscrire à l'ordre du jour de la Conférence la question de sa revision totale ou partielle.

ARTICLE 18.

At the expiration of each period of ten years after the coming into force of this Convention, the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall consider the desirability of placing on the Agenda of the Conference the question of its revision in whole or in part.

ARTICLE 19.

1. Au cas où la Conférence adopterait une nouvelle convention portant revision totale ou partielle de la présente convention, et à moins que la nouvelle convention ne dispose autrement:

a) la ratification par un Membre de la nouvelle convention portant revision entraînerait de plein droit, nonobstant l'article 17 ci-dessus, dénonciation immédiate de la présente convention, sous réserve que la nouvelle convention portant revision soit entrée en vigueur;

b) à partir de la date de l'entrée en vigueur de la nouvelle convention portant revision, la présente convention cesserait d'être ouverte à la ratification des Membres.

2. La présente convention demeurerait en tout cas en vigueur dans sa forme et teneur pour les Membres qui l'auraient ratifiée et qui ne ratifieraient pas la convention portant revision.

ARTICLE 20.

Les textes français et anglais de la présente convention feront foi l'un et l'autre.

ARTICLE 19.

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides,

Revision of Convention, effect.

(a) the ratification by a Member of the new revising Convention shall *ipso jure* involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

ARTICLE 20.

Texts, authenticity.

The French and English texts of this Convention shall both be authentic.

AND WHEREAS it is provided in Article 14 of the said draft convention that the formal ratifications thereof shall be communicated to the Secretary-General of the League of Nations for registration and in Article 15 that the convention shall come into force twelve months after the date on which the ratifications of two Members of the International Labor Organization have been registered with the Secretary-General of the League of Nations and that thereafter the convention shall come into force for any Member twelve months after the date on which its ratification has been registered;

AND WHEREAS the said draft convention was duly ratified on the part of the United States of America subject to understandings as follows:

U. S. ratification subject to understandings.

"That the United States Government understands and construes the words 'vessels registered in a territory' appearing in

this convention to include all vessels of the United States as defined under the laws of the United States.

"That the United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only.

"That the provisions of this convention shall apply to all territory over which the United States exercises jurisdiction except the Government of the Commonwealth of the Philippine Islands and the Panama Canal Zone, with respect to which this Government reserves its decision."

Ratification by Belgium, registration.

AND WHEREAS the ratification of the said draft convention by Belgium was registered with the Secretary-General of the League of Nations on April 11, 1938, subject to subsequent decisions regarding application to the Belgian Congo and the territories under Belgian Mandate and the ratification thereof by the United States of America, subject to the understandings above recited, was registered with the Secretary-General on October 29, 1938;

Ratification by U. S., registration.

Effective date; scope.

AND WHEREAS by such registrations the said draft convention became a formal convention between the United States of America and Belgium on October 29, 1938, which, pursuant to Article 15 thereof, will come into force as between the United States of America and Belgium on October 29, 1939, twelve months after the date on which the ratification of the United States of America was registered with the Secretary-General of the League of Nations, and pursuant to the same Article, will come into force, for other Members of the International Labor Organization whose ratifications may have been or hereafter may be registered with the Secretary-General of the League of Nations subsequent to October 29, 1938, twelve months after the date on which the ratification has been or may be registered in each case;

Proclamation.

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled in good faith by the United States of America and the citizens thereof, on and from October 29, 1939, subject to the understandings above recited and to any exceptions and any limitations of liability in accordance with the provisions of the convention which may be made by legislation or regulations on the part of the United States of America.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-ninth day of September in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States of America the one hundred and sixty-fourth.

[SEAL]

FRANKLIN D ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.

Appendix 5(f)

TITLE 77—INJURIES RESULTING IN DEATH

Article 4671. 4694, 3017, 2899 Cause of action

No agreement between any owner of any railroad, street railway, steamboat, stage-coach or other vehicle for transporting passengers or goods, or any industrial or public utility plant, or other machinery, and any person, corporation, trustee, receiver, lessee, joint stock association or other person in control of, or operating the same, shall release such owner, person, trustee, lessee, corporation or joint stock association from any liability fixed by the provisions of this article. An action for actual damages on account of the injuries causing the death of any person may be brought in the following cases:

1. When an injury causing the death of any person, occurring either within or without this state, is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of another person, association of persons, joint stock company, corporation or trustee or receiver of any person, corporation, joint stock company, or association of persons, his, its or their agents or servants, such persons, association of persons, joint stock company, corporation, trustee or receiver, shall be liable in damages for the injuries causing such death. The term "corporation," as used in this article, shall include all municipal corporations, as well as all private and public and quasi public corporations, except counties and common and independent school districts.

2. When an injury causing the death of any person occurring either within or without this state, is caused by the wrongful act, neglect, carelessness, unskillfulness, or default of the proprietor, owner, charterer or hirer of any industrial or public utility plant, or any railroad, street railway, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, wrongful act, neglect, carelessness, unskillfulness or default of his, their or its servants or agents, such proprietor, owner, charterer or hirer shall be liable in damages for the injuries causing such death.

3. When an injury causing the death of any person, occurring either within or without this state, is caused by the wrongful act, neglect, carelessness, unskillfulness or default of the receiver, trustee or other person in charge of or in control of any railroad, street railway, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or any industrial plant, public utility plant, or any other machinery, or by the wrongful act, neglect, carelessness, unfitness, unskillfulness or default of his or their servants or agents, such receiver, trustee, or other person shall be liable in damages for the injuries causing such death, and the liability here fixed against such receiver, trustee, or other person shall extend to all cases in which the death is caused by reason of any bad or unsafe condition of the railroad, street railway or other machinery under the control or operation of such receiver, trustee or other person, and to all other cases in which the death results from any other reason or cause for which an action may be brought for damages on account of personal injuries, the same as if said railroad, street railway or other machinery were being operated by the owner thereof.

Amended by Acts 1975, 64th Leg., p. 1381, ch. 530, § 1, eff. Sept. 1, 1975.

Cross References

Comparative negligence and contribution among joint tort-feasors, see art. 2212a.

Medical Liability and Insurance Improvement Act, applicability of this article to liability limits, see art. 4590i, § 11.05.

Law Review Commentaries

Abortion law: Consent requirements and special statutes. Terry O. Tottenham, Dan M. Peterson and Marsha L. Reingen. 18 Houston L.Rev. 819 (1981).

Appendix 5(g)

Art. 4678. Death in foreign State

Whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any foreign State or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign State or country, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statutes of this State. The law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to the procedure. Acts 1913, p. 338; Acts 1917, p. 365.

Notes of Decisions

1. Right of action in general

The cause of action for wrongful death given by Comp.Laws N.M.1884, §§ 2309, 2310, as amended by Laws 1891, c. 49, is transitory, and may be maintained in a state other than that of New Mexico. Atchison, T. & S. F. Ry. Co. v. Berkshire, Civ.App., 201 S.W. 1093.

In a servant's action for injuries, based on the defendant railroad's violation of the federal Safety Appliance Act, 45 U.S.C.A. § 1 et seq., the master's liability was enforceable in courts of Texas, without reference to the laws of California, where the tort occurred. Southern Pac. Co. v. Henderson, Civ.App., 208 S.W. 561.

That only one action can be brought in Texas for a tort, and that subsequent actions can be brought in Mexico for damages accruing after trial, does not prevent a Texas court from assuming jurisdiction of action for tort committed in Mexico, and giving judgment for damages accruing before trial. Under pleadings and evidence in action for damages for tort committed in Mexico, held that it was not necessary to invoke provisions of Acts 35th Leg. c. 156, bestowing jurisdiction upon courts of Texas in cases involving torts committed in foreign countries, to justify court in taking jurisdiction. El Paso Electric Ry. Co. v. Carruth, Civ.App., 208 S.W. 954.

A resident of Texas, suffering personal injuries in another state while employed in interstate commerce by a common carrier domiciled in Texas, can bring suit in Texas to enforce the carrier's liability under the federal Safety Appliance Acts, 45 U.S.C.A. § 1 et seq. St. Louis Southwestern Ry. Co. of Texas v. Smitha, 111 T. 295, 232 S.W. 494.

Under this article, it is the cause of action given by the law of such other state that Texas courts are authorized to enforce, and the lex loci delictus must determine the nature of the cause of action and the available defenses. The laws of Texas are applicable in determining what courts have jurisdiction of the cause of action; the rules of evidence as to burden of proof, weight of evidence, and whether an issue is one of law or fact; the respective functions of court and jury in the trial, and the nature and extent of review on appeal; so that in a case of death at crossing, whether deceased, in approaching the crossing, used ordinary care to discover the train approaching and protect himself, and whether before attempting to cross he stopped, looked and listened, and used ordinary care in so doing, is determinable by the rules of evidence and under the established procedure of Texas courts. Jones v. Louisiana Western Ry. Co., Com.App., 243 S.W. 976, reversing judgment, Civ.App., Louisiana Western Ry. Co. v. Jones, 223 S.W. 363.

Under this article, recovery for mental and physical suffering of deceased, authorized by the law of the state where the injury occurred, may be had in an action in Texas, though not authorized when the injury occurred in Texas. Davis v. Gant, Civ.App., 247 S.W. 576.

The employee of a traction company was injured in the state of Chihuahua, Mex., through coming in contact with a charged guy wire. Held that the laws of Mexico pertaining to the action were so different from the laws of Texas as to require a dismissal of the case for want of jurisdiction. El Paso & Juarez Traction Co. v. Carruth, Com.App., 255 S.W. 159, reversing judgment, Civ.App., El Paso Electric Ry. Co. v. Carruth, 208 S.W. 954.

Citizen residing in another state has absolute right to sue another resident thereof in Texas court for damages from auto-

Appendix 5(R)

for service within the state until filing of first motion by defendant to quash, setting up that fact, and that they were acting in good faith and had a bona fide intention to obtain service on defendant, if possible, at earliest possible time, and a comparatively short time elapsed, action was commenced by filing of petition in state court within meaning of rule that actions in district or county courts in Texas are commenced, within meaning of statutes of limitation, by filing a petition with a bona fide intent that process issue thereon. Stephenson v. Triangle Publications (D.C.1952) 104 F.Supp. 215.

Filing of petition halts running of statute of limitations. City of Fort Worth v. Fort Worth Radiator Mfg. Co. (Civ.App. 1955) 278 S.W.2d 184, ref. n. r. e.

Art. 5525. [5686] Survival of cause of action

All causes of action upon which suit has been or may hereafter be brought for personal injuries, or for injuries resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of the death of the person against whom such cause of action shall have accrued, nor by reason of the death of such injured person, but, in the case of the death of either or both, all such causes of action shall survive to and in favor of the heirs and legal representatives and estate of such injured party and against the person, or persons liable for such injuries and his or their legal representatives, and may be instituted and prosecuted as if such person or persons against whom same accrued were alive. Acts 1925, p. 299, 39th Leg., ch. 115, § 2; Acts 1927, 40th Leg., p. 356, ch. 239, § 1.

Historical Note

The amendatory act of 1927, added the phrase "nor by reason of the death of such injured person."

Cross References

Actions for injuries resulting in death, see arts. 4675, 4676.

Notes of Decisions

1. Validity

Caption to amendment to statute relating to survival of actions making plain what amendment was, provision retained from original statute was not void because not named in caption of amendment. Marcus v. Huguley (Civ.App.1931) 37 S.W.2d 1100.

2. Construction and application

This statute has no effect on a cause of action which had abated, according to the rule of the common law before it took effect. Fitzgerald v. W. U. Tel. Co. (1897) 15 C.A. 143, 40 S.W. 421.

When an injury occurred prior to the passage of the act, which resulted in death after the enactment, the death of the injured person did not abate the suit. City of Marshall v. McAllister (1898) 18 C.A. 159, 43 S.W. 1043.

Even if claim against county for deficiency at rate of $400 per annum in payment of salary of plaintiff's father, now deceased, as justice of the peace was one requiring presentation to commissioners' court, right to present it arose each month when county paid less than was due, and right to present claim would be barred in two years after that right accrued under doctrine of laches by applying limitation period by analogy, and such period could not be extended by delay in presenting claim to commissioners' court. Jackson v. Tom Green County (Civ.App.1948) 208 S.W. 2d 115, ref. n. r. e.

Appendix 5(i)

Rule

Rule 60. Relief From Judgment or Order

(a) Clerical mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.)

6

MARINE SERVICES AGREEMENT

Esso Tankers Inc., a Liberian corporation (hereinafter referred to as "Tankers"), and Esso International Inc., a Delaware corporation (hereinafter referred to as "InterEsso"), hereby agree as follows:

1. General

InterEsso agrees during the term of this Agreement to perform, or cause to be performed, the services described herein on behalf of Tankers with respect to such vessels as are from time to time owned or demise chartered by Tankers. Such vessels are hereinafter referred to as "Tankers' Vessels".

Although in the course of performing said services InterEsso may, in its discretion, appoint Agents and Sub-Agents as it sees fit, it shall at all times remain responsible for the performance of said services in accordance with the terms hereof, and no such Agents or Sub-Agents shall be deemed Agents or Sub-Agents of Tankers.

2. Services

The services to be performed hereunder with respect to Tankers' Vessels shall include:

(a) Arranging for engagement and dismissal of officers and crew, all of whom shall be employees of Tankers, and for the payment of their wages, overtime, traveling expenses, and other compensation.

(b) Negotiating collective bargaining agreements with labor organizations representing officers and crew.

(c) Preparing annual repair budgets and arranging for necessary repairs.

(d) Preparation of proposed annual capital budgets for Tankers' consideration.

CTL Document No. 4

Exhibit II

(e) Design of and supervision of construction of Tankers' Vessels.

(f) Procurement of and payment for all pilotage, towage, agency and all other services necessary for the operation of Tankers' Vessels.

(g) Purchase or rental of necessary equipment such as navigation, communication and tank cleaning equipment.

(h) Purchase of necessary fuel, water, provisions, stores, and other supplies and equipment.

(i) Recommendations with respect to outward charter parties and other contracts of affreightment.

(j) Issuance of shipping documents and voyage and berthing instructions to masters and agents.

(k) Rendering of invoices for all hire and freights earned on account of the operations of Tankers' Vessels and collection of payments due.

(l) Reviewing of dispatch, analysis of logs and other ships' data, and maintenance of performance records so as to assure efficient operation.

(m) Arranging for and implementing management of marine risks, including those relative to hulls, shipowners' legal liabilities, pollution, crews and crews' effects by purchase of insurance and/or the use of self-insurance on the part of Tankers; investigation, handling and disposal of all claims including collision, general average, salvage, cargo loss or damage and other marine and pollution claims; engaging of attorneys, posting of bonds, retaining of adjusters and surveyors in connection with said claims, and execution of such powers of attorney as may be necessary

to carry out the foregoing.

(n) Maintenance of all such accounting and bookkeeping records as shall be appropriate under established accounting practice with respect to the operations of each of Tankers' Vessels, and preparation of statements of financial position and results of operations in such form and at such time as Tankers and InterEsso may agree.

(o) Preparation of estimated and/or actual voyage costs and such economic studies relating to Tankers' Vessels as shall be reasonably requested by Tankers.

(p) The making of all such payments for Tankers' account as are required to discharge obligations of Tankers as may be reasonably incurred as a result of the rendering of the above services.

(q) Upon Tankers' request, the performance of such other services with respect to Tankers' Vessels as are necessary to assure the efficient operation thereof, including special projects relating thereto.

3. Audit

Upon Tankers' request, InterEsso from time to time shall arrange to have an independent certified public accountant audit all records and services prescribed in this Agreement and shall cause the results of such audits to be made known to Tankers.

4. Fee

Tankers shall pay InterEsso an annual fee in U.S. Dollars to be agreed upon and will reimburse InterEsso for all expenditures incurred in connection herewith.

Tankers shall also pay InterEsso charges to be agreed upon in connection with the performance of special projects hereunder.

5. Funds

Upon request by InterEsso, Tankers shall make available to InterEsso such funds as InterEsso requires in connection with the performance of services hereunder.

6. Law Governing

This Agreement shall be governed by the laws of the State of New York.

7. Disputes

Any controversy or claim arising out of or relating to this Agreement or breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association. This Agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court of any country having jurisdiction.

8. Indemnity

Provided that InterEsso exercises all reasonable efforts to carry out its obligations under the terms of this Agreement, InterEsso shall not be liable in respect of any loss arising out of or related to the faulty operation of any of Tankers' Vessels, or on account of the failure of the officers or crew of any such Vessel to carry out their functions properly or on account of any other act or omission not reasonably within the control of InterEsso. Tankers shall indemnify and hold InterEsso harmless against any loss or liability arising out of the

performance by InterEsso of its services hereunder to the extent InterEsso is excused from liability under this Section 8. InterEsso shall be under no liability of any kind or nature whatsoever to Tankers in the event that InterEsso should fail to perform any services hereunder by reason of Government order, or any strike or lockout or for any shortage of material or any Act of God or peril of the sea or any dispute or difficulty or any other cause beyond the control of InterEsso whether or not of the same or similar nature or in case InterEsso shall do or fail to do any Act in reliance upon instructions of military or naval authorities.

9. Effective Date

This Agreement executed in duplicate shall be considered effective as of 12:01 A.M. Eastern Standard Time on the 17th day of December, 1969 and may be terminated by either party on ninety (90) days prior written notice or immediately, by mutual consent.

IN WITNESS WHEREOF, the parties hereto have caused their names to be subscribed and their corporate seals to be affixed as of the day of the year first above written.

ATTEST:

SECRETARY

ESSO TANKERS INC.

ATTEST:

SECRETARY

ESSO INTERNATIONAL INC.

SENIOR VICE-PRESIDENT

EXHIBIT No. 4

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EXHIBIT III

Itinerary of ESSO WILHELMSHAVEN

July 18, 1970 Through the Year 1973

July 18, 1970	Bremerhaven
August 16, 1970	Ras Tanura
September 18, 1970	Milford Haven
October 17, 1970	Ras Tanura
November 20, 1970	Rotterdam
December 22, 1970	Ras Tanura
January 24, 1971	Milford Haven
January 26, 1971	Fawley
February 25, 1971	Mina Al Ahmadi
March 28, 1971	Lime Bay
March 29, 1971	Rotterdam
April 29, 1971	Ras Tanura
June 1, 1971	Tenerife
June 13, 1971	Milford Haven
June 15, 1971	Fawley
July 16, 1971	Mina Al Ahmadi
August 18, 1971	Jebel Dhanna
September 21, 1971	Ras Tanura
October 23, 1971	Milford Haven

October 25, 1971	Fawley
November 24, 1971	Ras Tanura
November 26, 1971	Kharg Island
December 30, 1971	Milford Haven
January 29, 1972	Ras Tanura
March 5, 1972	Milford Haven
March 8, 1972	Fawley
March 26, 1972	Capetown
April 12, 1972	Ras Tanura
May 17, 1972	Rotterdam
June 19, 1972	Ras Tunura
July 24, 1972	Rotterdam
August 24, 1972	Kharg Island
September 15, 1972	Kawasaki
September 26, 1972	Sakai Shipyard
November 12, 1972	Das Island
November 16, 1972	Mina Al Ahmadi
December 18, 1972	Rotterdam
January 16, 1973	Ras Tanura
February 16, 1973	Le Harve
March 19, 1973	Ras Tanura
April 20, 1973	La Harve
May 19, 1973	Jebel Dhanna
May 25, 1973	Ras Tanura

June 24, 1973	L. Avera/FOS
July 11, 1973	Capetown
July 25, 1973	Mina Al Ahmadi
August 28, 1973	Milazzo, Sicily
September 26, 1973	Ras Tanura
October 30, 1973	Rotterdam
December 5, 1973	Karachi
December 11, 1973	Jebel Dhanna
December 14, 1973	Das Island

MAR 22, 1979

ESSO WILHELMSHAVEN VOYAGE DATA
YEAR 1973 THRU 1979
(L=LOAD, D=DISCHARGE, A=STOP, R=STOP

	INDIC	VOYAGE NUMBER	PORT	MONTH DAY	SAILED DATE
1973					
	A		TENERIFFE	00/00	00/00
			KARACHI	00/00	00/00
	L	15	RAS TANURA	03/19	03/22
	D	15	LE HAVRE	04/20	04/22
	L	16	JEBEL DHANNA	05/19	05/24
			RAS TANURA	05/25	05/26
	D	16	LAVERA	06/24	06/26
	R		CAPETOWN	07/11	07/12
	L	17	MINA AL AHMADI	07/25	07/28
	D	17	MILAZZO SICILY	08/28	08/30
	L	18	RAS TANURA	09/26	09/28
	D	18	ROTTERDAM	10/30	11/01
	L	019	JEBEL DHANNA	12/11	12/14
			DAS ISLAND	12/14	12/18
			RAS TANURA	12/18	12/22
1974					
	A		TENERIFFE	00/00	00/00
	D	019	LAVERA	01/24	01/26
	L	020	RAS TANURA	02/28	03/02
	D	020	LAVERA	04/03	04/06
	L	021	RAS TANURA	05/05	05/07
	D	021	LYME BAY	06/13	06/13
			LE HAVRE	06/14	06/15
			FAWLEY	06/15	06/17
	A		TENERIFFE	06/21	06/21
	L	022	RAS TANURA	07/16	07/21
	D	022	LE HAVRE	08/31	09/03
			WILHELMSHAVEN	09/05	09/07
	L	023	RAS TANURA	10/05	10/09
	D	023	ARUBA	11/13	11/15
	A		MINA AL AHMADI	12/14	12/14
	L	021	RAS TANURA	12/19	12/22
1975					
	D	024	ARUBA	01/30	01/31
			ARUBA	02/01	02/02
	L	025	RAS AL KHAFJI	03/12	03/15
			RAS TANURA	03/16	03/18
	R		DUBAI	03/19	03/19

MAR 22, 1979

ESSO WILHELMSHAVEN VOYAGE DATA
YEAR 1973 THRU 1979
(LOADS, DISCHARGE, ARRIVE, ARRIVE)

	INDIC	VOYAGE NUMBER	PORT	MONTH DAY	SAILED DATE
1975					
	D	025	KAWASAKI	08/11	08/13
	R		SINGAPORE	08/24	09/25
	L	026	JEBEL DHANNA	06/06	06/07
			RAS TANURA	06/08	06/10
	D	026	KAWASAKI	07/03	07/05
	A		COLOMBO	07/21	07/22
	L	027	RAS TANURA	07/26	07/30
	D	027	SINGAPORE	08/12	08/15
	R		SINGAPORE	08/15	08/16
	L	028	RAS TANURA	08/26	08/28
	D	028	MILFORD HAVEN	10/04	10/05
			LE HAVRE	10/06	10/08
	R		LE HAVRE	10/08	10/09
	A		TENERIFFE	10/13	10/13
	L	029	RAS TANURA	11/12	11/14
	D	029	ARUBA	12/23	01/06
1976					
	A		DUBAI	00/00	00/00
	L	030	JUAYMAH	02/04	02/16
	D	030	SAVONA	03/20	03/21
			GENOA	03/21	03/24
	A		TENERIFFE	03/29	03/30
	L	031	JEBEL DHANNA	04/24	04/26
			JUAYMAH	04/30	05/01
	D	031	ARUBA	06/07	06/11
	L	032	JEBEL DHANNA	07/19	07/22
			RAS TANURA	07/25	07/26
	D	032	ARUBA	08/31	09/02
	L	033	JEBEL DHANNA	10/13	10/14
			RAS TANURA	10/15	10/15
	A		DUBAI	10/17	10/17
	D	033	ARUBA	11/25	12/11
1977					
	A		TENERIFFE	00/00	00/00
	L	034	JEBEL DHANNA	01/14	01/16
			RAS TANURA	01/17	01/19
	A		SINGAPORE	01/31	01/31
	D	034	KAWASAKI	02/11	02/15
			SHIMIZU	02/15	02/15
	R		SINGAPORE	02/21	02/22
	L	035	ARUBA ISLAND	04/15	04/20
	A		DUBAI	04/22	04/24

AH 22, 1974

ESSO WILHELMSHAVEN VOYAGE DATA
YEAR 1973 THRU 1979
(L=LOAD, D=DISCHARGE, A=STUP, W=STOP)

	INDIC	VOYAGE NUMBER	POINT	MONTH DAY	SAILED DATE
977					
	U	035	ARUBA	06/12	07/05
	A		BRIDGETOWN	07/07	07/10
	L	036	RAS TANURA	08/10	08/12
	A		RAS TANURA	08/12	08/13
	D	036	AIN SUKHNA	08/23	08/26
	L	037	RAS TANURA	09/05	09/07
	D	037	ROTTERDAM	10/20	10/23
	W		LAS PALMAS	10/29	11/01
	L	038	DAS ISLAND	12/05	12/07
			RAS TANURA	12/07	12/08
978					
	D	038	A GULF	01/21	02/06
	A		ARUBA	02/12	02/17
			DARWFIN	04/02	04/04
	L	039	UMM SAID	04/04	04/06
			RAS TANURA	04/06	04/08
	D	039	LYME BAY	05/18	05/20
			SLAGEN	05/23	05/25
	A		TENERIFFE	06/04	06/07
			RAS AL KHAIMAH	07/15	07/15
	L	040	KHARG ISLAND	07/17	07/18
			RHOW AL AMAYA	07/19	08/00
	D	040	MILFORD HAVEN	09/02	09/05
	W		LYME BAY	09/06	09/08
	A		TENERIFFE	09/13	09/13
	L	041	FOHEAUUIS	09/22	09/24
			MEDWAY	09/25	09/27
	A		ARUBA	10/13	10/15
	W	041	GRAND CAYMAN	10/19	10/25
	I	042	KHARG ISLAND	11/20	12/22
979					
	P		SINGAPORE	00/00	00/00
	L	043	MG	00/00	00/00
	I	043	UFC	00/00	00/00
		042	ST CHRIS	01/25	02/01
	A		FOHEAUUIS	02/04	02/20

JAN 22, 1979

ESSO WILHELMSHAVEN VOYAGE DATA
YEAR 1973 THRU 1979
(L=LOAD, D=DISCHARGE, A=STOP, R=STOP

	INDIC	VOYAGE NUMBER	PORT	MONTH DAY	SAILED DATE
1973					
	A		TENERIFFE	00/00	00/00
			KARACHI	00/00	00/00
	L	15	RAS TANURA	03/19	03/22
	D	15	LE HAVRE	04/20	04/22
	L	16	JEBEL DHANNA	05/19	05/24
			RAS TANURA	05/25	05/26
	D	16	LAVERA	06/24	06/26
	R		CAPETOAN	07/11	07/12
	L	17	MINA AL AHMADI	07/25	07/28
	D	17	MILAZZO SICILY	08/28	08/30
	L	18	RAS TANURA	09/26	09/28
	D	18	ROTTERDAM	10/30	11/01
	L	019	JEBEL DHANNA	12/11	12/14
			DAS ISLAND	12/14	12/18
			RAS TANURA	12/18	12/22
1974					
	A		TENERIFFE	00/00	00/00
	D	019	LAVERA	01/24	01/26
	L	020	RAS TANURA	02/28	03/02
	D	020	LAVERA	04/03	04/06
	L	021	RAS TANURA	05/05	05/07
	D	021	LYME BAY	06/13	06/13
			LE HAVRE	06/14	06/15
			FAWLEY	06/15	06/17
	A		TENERIFFE	06/21	06/21
	L	022	RAS TANURA	07/26	07/28
	D	022	LE HAVRE	09/01	09/03
			WILHELMSHAVEN	09/05	09/07
	L	023	RAS TANURA	10/08	10/09
	D	023	ARUBA	11/13	11/15
	A		MINA AL AHMADI	12/14	12/14
	L	021	RAS TANURA	12/19	12/22
1975					
	D	024	ABU DI	01/29	01/31
			AMUBA	02/01	02/02
	L	025	RAS AL KHAFJI	03/12	03/15
	W		RAS TANURA	03/16	03/16
			DUBAI	03/19	03/19

Exhibit K

MAR 22, 1979

ESSO WILHELMSHAVEN VOYAGE DATA
YEAR 1973 THRU 1979
(L=LOAD, D=DISCHARGE, A=STOP, R=STOP

	INDIC	VOYAGE NUMBER	PORT	MONTH DAY	SAILED DATE
1975					
	D	025	KAWASAKI	08/11	08/13
			SINGAPORE	04/24	05/25
	N	026	JEBEL DHANNA	06/06	06/07
	L		RAS TANURA	06/08	06/10
	D	026	KAWASAKI	07/05	07/06
	A		COLOMBO	07/21	07/22
	L	027	RAS TANURA	07/28	07/30
	D	027	SINGAPORE	08/12	08/15
	R		SINGAPORE	08/15	08/16
	L	028	RAS TANURA	08/26	08/28
	O	028	MILFORD HAVEN	10/04	10/05
			LE HAVRE	10/06	10/08
	R		LE HAVRE	10/08	10/09
	A		TENERIFFE	10/13	10/13
	L	029	RAS TANURA	11/12	11/15
	D	029	ARUBA	12/23	01/06
1976					
	A		DUBAI	00/00	00/00
	L	030	JUAYMAH	02/09	02/10
	D	030	SAVONA	03/20	03/21
			GENOA	03/21	03/24
			TENERIFFE	03/29	03/30
	A		JEBEL DHANNA	04/26	04/28
	L	031	JUAYMAH	04/30	05/01
			ARUBA	06/07	06/11
	D	031	JEBEL DHANNA	07/18	07/22
	L	032	RAS TANURA	07/23	07/24
			ARUBA	08/31	09/02
	D	032	JEBEL DHANNA	10/10	10/12
	L	033	RAS TANURA	10/13	10/15
			DUBAI	10/16	10/17
	A		ARUBA	11/25	12/11
	D	033			
1977					
			TENERIFFE	00/00	00/00
	A		JEBEL DHANNA	01/14	01/16
	L	034	RAS TANURA	01/17	01/19
			SINGAPORE	01/31	01/31
	A		KAWASAKI	02/11	02/13
	D	034	SHIMIZU	02/13	02/15
			SINGAPORE	02/27	03/02
	R		ARAMCO ISLAND	08/19	08/20
	L	035	DUBAI	08/22	08/23
	A				

AH 22, 1979

ESSO WILHELMSHAVEN VOYAGE DATA
YEAR 1973 THRU 1979
(L=LOAD, D=DISCHARGE, A=STOP, R=STOP)

	INDIC	VOYAGE NUMBER	PORT	MONTH DAY	SAILED DATE
977					
	D	035	ARUBA	06/12	07/05
	A		BRIDGETOWN	07/07	07/10
	L	036	RAS TANURA	08/10	08/12
	A		RAS TANURA	08/12	08/13
	D	036	AIN SUKHNA	08/23	08/26
	L	037	RAS TANURA	09/05	09/07
	D	037	ROTTERDAM	10/20	10/23
	R		LAS PALMAS	10/29	11/01
	L	038	DAS ISLAND	12/05	12/07
			RAS TANURA	12/07	12/08
978					
	D	038	W GULF	01/21	02/06
	A		ARUBA	02/12	02/17
			BAHREIN	04/02	04/04
	L	039	UMM SAID	04/04	04/06
			RAS TANURA	04/06	04/08
	D	039	LYME BAY	05/18	05/20
			SLAGEN	05/23	05/25
	A		TENERIFFE	06/04	06/07
			RAS AL KHAIMAH	07/15	07/15
	L	040	KHARG ISLAND	07/17	07/18
			KHOR AL AMAYA	07/19	00/00
	D	040	MILFORD HAVEN	09/02	09/05
	R		LYME BAY	09/06	09/08
	A		TENERIFFE	09/13	09/15
	L	041	FOWCADUS	09/22	09/26
			ADUAY	09/25	09/27
	A		ARUBA	10/11	10/15
	D	041	GRAND CAYMAN	10/18	10/25
	L	042	KHARG ISLAND	11/26	12/22
979					
	R		SINGAPORE	00/00	00/00
	L	043	PG	00/00	00/00
	D	043	UKC	00/00	00/00
		042	ST CROIX	01/26	02/01
	A		FOWCADUS	02/19	02/20

Appendix 8

EXHIBIT VI

March, 1977 ESSO WILHELMSHAVEN Crew List

Captain C. Devetta	Corso Solferino, 14/12 16122 Genova
Chief Engineer S. Sclafini	Vis L. Biasoili 341 16167 Genova Nervi
Chief Mate A. Copello	Via Val Di Lanzo 113 00141 Tome
Second Mate M. Demelas	Via Salvatore Dav Pal A/5 Sassari, Sardinia
Third Mate P. Badalucco	Via Tunisi 32 Trappini, Sicily
First Engineer L. Abbate	Via Cilea 93 09045 Quarto S. Elena
Second Engineer L. Cosenza	Via Punta La Guardia 35 80069 Vico Equense
Third Engineer R. Distanio	Via Piave 20/6 04024 Gaeta
Machinist N. Prezioso	Corso Umberto 4/D 70056 Molfetta
Machinist G. Minirvini	Via Crocefisco 72 70056 Molfetta

NO. 82-2062

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

CHICK KAM CHOO, ETC., ET AL.,
Petitioners

v.

EXXON CORPORATION, ETC., ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES PATRICK COONEY
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

Attorney for Respondents

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

NO. 82-2062

IN THE

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OCTOBER TERM 1983

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Petitioners

v.

EXXON CORPORATION, ETC., ET AL.,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Judges of the Supreme Court of the United States:

COMES NOW, Exxon Corporation, Esso Tankers, Inc. and Esso Exploration Incorporated, Respondents,[1] and

1. The Defendants named in the Original Complaint in Civil Action No. H-78-628 in the Southern District of Texas were Esso Oil Company, a non-existent entity, Esso Exploration, Inc., and Exxon Company, U.S.A., an unincorporated division of the Exxon Corporation. The Defendants named in Civil Action No. H-78-477 in the Southern District of Texas were the Exxon Corporation, Esso Tankers, Inc. and Exxon International Company, Inc., an unincorporated division of Exxon Corporation. The two Civil Actions were consolidated by the District Court.

file this their Brief in Opposition To The Petition For Certiorari filed herein, and would show as follows:

STATEMENT OF THE CASE

The Petitioners are seeking review of the affirmance by the Fifth Circuit Court of Appeals of a denial by the United States District Court for the Southern District of Texas of a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the Final Judgment entered in this consolidated action on July 31, 1980, dismissing the action under the doctrine of *forum non conveniens.*

A. Course of Proceedings and Disposition in Court Below.

This case involves two wrongful death actions seeking recovery for the deaths of three Singaporean shipyard workers who were killed while working on the ESSO WILHELMSHAVEN at Sembawang Shipyard, Singapore, in two separate incidents during March, 1977. The first action (C.A. No. H-78-477) was filed in the United States District Court for the Southern District of Texas on March 14, 1978; the second action (C.A. No. H-78-628) was filed in the same court on April 10, 1978. Motions to consolidate, for summary judgment and to dismiss under the doctrine of *forum non conveniens* were filed by the Respondents on March 26, 1979. The two actions were consolidated by the district court on August 9, 1979. The motions for summary judgment and to dismiss on the basis of the doctrine of *forum non conveniens* were referred to the United States Magistrate, who filed his Memorandum and Recommendation on June 23, 1980.

The Magistrate recommended to the district court that the Respondents' motions be granted and that the consolidated actions be dismissed. The district court entered its Order of Dismissal and Final Judgment on July 31, 1980. No notice of appeal was filed. Petitioners filed their motion to set aside the judgment pursuant to Rule 60(b) on October 22, 1980, almost two months after the time for appeal had expired. This motion was denied by the district court on December 8, 1981. A Notice of Appeal from the denial of Petitioners' Rule 60(b) motion was filed on January 11, 1982. The denial of the Rule 60(b) motion was affirmed by the United States Court of Appeals for the Fifth Circuit on January 24, 1983, and Petitions for Rehearing and Rehearing *En Banc* were denied on March 11, 1983, 699 F.2d 693 (5th Cir. 1983).

B. Statement of Facts.

These consolidated actions seek to recover damages for the deaths of three Singapore shipyard workers who were killed in Singapore while working aboard the S/T ESSO WILHELMSHAVEN, while the vessel was undergoing repairs at the Sembawang Shipyard. The decedents Teo Ho Aik and Koo Ming Kuang met their deaths on March 13, 1977, as the result of an explosion during welding operations aboard the vessel. The decedent Leong Chong met his death on March 24, 1977, as a result of being struck on the head by a piece of metal while engaged in repair work aboard the vessel. Petitioners sought to recover under the Jones Act, 46 U.S.C.A. § 688; the Death on the High Seas Act, 46 U.S.C.A. § 761, *et seq.*; the Texas Wrongful Death Statute, Tex. Rev. Civ. Stat. Ann., Art. 4671-78 (Supp. 1982); the Texas Survival

Statutes, Tex. Rev. Civ. Stat. Ann., Art. 5525 (1958); the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, *et seq.;* and the general maritime law of the United States, common law negligence and common law products liability and/or marine products liability.

The ESSO WILHELMSHAVEN is a steam turbine tanker built in Germany in 1970 and documented under the laws of the Republic of Liberia. (R. Vol. 1, p. 27) She is of 113,752 gross tons, and has a length of approximately 1,141 feet and a draft of approximately 65 feet. (R. Vol. 2, p. 228) At the time of the two incidents and at all other material times, the vessel was owned by Esso Tankers Inc., a corporation existing under the laws of the Republic of Liberia, which is an indirectly owned affiliate of the Exxon Corporation (R. Vol. 2, p. 100), and managed by Exxon International Company, an unincorporated division of Exxon Corporation, pursuant to a Marine Service Agreement existing between Esso Tankers and Exxon International. At all material times the vessel's officers and unlicensed crew were Italian nationals hired for Esso Tankers. (R. Vol. 1, p. 27) The vessel never called in the United States prior to the accidents here in question. Following the accidents, the vessel made one visit to St. Croix in the Virgin Islands in January, 1979. (Affidavit of Rudolph W. Haessner filed August 2, 1979, hereinafter referred to as "Haessner Affidavit"). See Order granting motion to correct record filed December 22, 1983.

The ESSO WILHELMSHAVEN was in the Sembawang Shipyard in March of 1977 for dry docking and repair pursuant to a Repair Contract between Exxon and Sem-

TRULY CREW LIST

RANK/RATING	NAME		VALID D-VISA (YES OR NO)	ENLIST. DATE	DATE JOINED VESSEL	DATE DISEMBARK	PORT	*REASON
MASTER	DEVENDA	Claudio	Yes	12.1.76	12.2.76			
Ch.Mate	DE ROSA	Michele	Yes	8.27.76	8.31.76	3.9.77	Singapore	Vacation
Ch.Mate	COPELLO	Antonio	Yes	3.1.77	3.4.77			
2ndMate	[illegible]AN	Mario	Yes	11.11.76	11.26.76			
2ndMate	SEGRE	Francesco	Yes	10.7.76	10.9.76	3.21.77	Singapore	Vacation
2ndMate	PADALUCCO	pietro	Yes	11.19.76	11.26.76			
3rdMate	SPINOSA	Pasquale	Yes	3.18.77	3.21.77			
R.O.	LISTER	Mario	Yes	1.10.77	1.14.77			
C. Engr.	SCLABANI	Sergio	Yes	1.10.77	1.14.77			
1stEng.	ARRAGE	Luigi	Yes	1.10.77	1.14.77			
2ndEngr.	CACCIATORE	Antonio	Yes	10.7.76	10.9.76	3.30.77	Singapore	Vacation
2ndEngr.	BORRELLO	Salvatore	Yes	11.19.76	11.26.76			
2ndEngr.	COSENZA	Luigi	Yes	1.10.77	1.14.77			
3rdEngr.	VELLUCCI	Cosmo	Yes	3.28.77	3.30.77			
Asst'n	ARAGNA	Vincenzo	Yes	1.18.77	1.31.77			
Fireman	VALORI	Riccardo	Yes	11.19.76	11.26.76			
A.B.	ROMANO	Marco	Yes	2.2.77	2.11.77			
A.B.	GERMINARIO	Mauro	Yes	2.2.77	2.11.77			
A.B.	Maccina	Salvatore	Yes	1.10.77	1.14.77			
A.B.	ALFIERI	Vito	Yes	1.10.77	1.14.77			
A.B.	ALMAGNE	Carlo	Yes	8.27.76	8.31.76	3.4.77	Singapore	Vacation
A.B.	CONTINA	Agatino	Yes	11.19.76	11.26.76			
A.B.	VULPASSO	Francesco	Yes	11.19.76	11.26.76			
A.B.	[illegible]EPE	Natale	Yes	10.7.76	10.9.76	3.21.77	Singapore	Vacation
Electr.	PINEVENTELA	Carmelo	Yes	10.7.76	10.9.76	3.30.77	Singapore	Vacation
[illegible]Electr.	ANSALDO	Enrico	Yes	3.1.77	3.4.77			
Cuchin	PRINCIPE	Corrado	Yes	10.2.76	10.9.76	3.21.77	Singapore	Vacation
Mechic.	PRIZIO	Nicolo'	Yes	11.19.76	11.26.76			

TOTAL NUMBER OF MEN ABOARD: 38

*OTHER THAN AUTHORIZED COMPLEMENT, INDICATE JOINING VESSEL FOR FAMILIARIZATION, SUPERNUMERARY, TRAINING (INCLUDING CADETS) ETC., OR DISEMBARKING FOR VACATION, TRANSFER TO OTHER VESSEL, MEDICAL, ETC.

SEE IA INSTRU

RANK/RATING	NAME		VALID D-VISA (YES OR NO)	ENLIST. DATE	DATE JOINED VESSEL	DATE DISEMBARK	PORT	*REASON
MstrMachin	HUGHERVIGI	Gaspare	Yes	3.18.77	3.21.77			
Oiler	LO BASSO	Ciro	Yes	1.10.77	1.14.77			
Oiler	INGRAVALLO	Ottavio	Yes	11.19.76	11.26.76			
Oiler	SESCA	Francesco	Yes	10.2.76	10.9.76	3.21.77	Sincenare	Vacation
Oiler	SALUSTIO	Pantaleo	Yes	3.18.77	3.21.77			
Oiler	SEENA	Vincenzo	Yes	1.10.77	1.14.77			
Oiler	PAPAROSA	Vincenzo	Yes	10.2.76	10.9.76	3.21.77	Sincenare	Vacation
Oiler	PALUMBO	Pasquale	Yes	3.18.77	3.21.77			
Cook	POLIGNOMI	Enrico	Yes	1.10.77	1.14.77			
2ndCook	GIARDINA	Francesco	Yes	1.10.77	1.14.77			
MessMan	TAMBACCO	Ruggero	Yes	3.1.77	3.4.77			
MessMan	MAGARELLI	Vito	Yes	8.27.76	8.31.76	3.4.77	Sincenare	Vacation
MessBoy	TARANTINO	Vincenzo	Yes	8.27.76	8.31.76	3.4.77	Sincenare	Vacation
MessBoy	DAMASCO	Domenico	Yes	3.1.77	3.4.77	3.31.77	Sincenare	Relief
		SUPERNUMERARIES						
Jr.Mate	MAZZELLA	Vincenzo	Yes	11.19.76	11.26.76			
Jr.Eng.	DI SCANIO	Raffaele	Yes	10.2.76	10.9.76	3.31.77	Sincenare	Vacation
Jr.Eng.	CONICELLI	Pasquale	Yes	3.28.77	3.30.77			
Fireman	TUVERE	Angelo	Yes	2.2.77	2.11.77			
WTR/TNDR	D. SCISCIOLO	Gaetano	Yes	2.2.77	2.11.77	3.4.77	Sincenare	Vacation
A.B.	PIGNATELLI	Luigi	Yes	2.2.77	2.11.77			
A.B.	DE PIETO	Ignazio	Yes	2.2.77	2.11.77			
A.B.	MARCELLA	Vittorio	Yes	2.2.77	2.11.77			
A.B.	DI JANNI	Antonio	Yes	2.2.77	2.11.77	3.4.77	Sincenare	Vacation
Stew.Sp	MIGI	Vitina	No	1.31.77	1.31.77			
Stew.Sp	VALERIO	Rita	No	3.4.77	3.4.77			

NUMBER OF MEN ABOARD: 38

*OTHER THAN AUTHORIZED COMPLEMENT, INDICATE JOINING VESSEL FOR FAMILIARIZATION, SUPERNUMERARY, TRAINING (INCLUDING CADETS), ETC., OR DISEMBARKING FOR VACATION, TRANSFER TO OTHER VESSEL, MEDICAL, ETC.

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bawang. The vessel entered the Sembawang Shipyard on March 2, 1977, and entered dry dock on March 3, 1977. On March 10, 1977, the vessel left dry dock and was shifted to Sembawang Berth No. 12 for additional repairs, including the welding of plates and brackets in the vessel's No. 3 port tank. Repairs were completed and the vessel proceeded to sea on March 31, 1977. (R. Vol. 2, pp. 63-68)

Petitioners' decedents, Koo Ming Kuang and Teo Ho Aik, were welders employed by Roma Project Engineering Company of Singapore ("Roma Project"), and were provided to Sembawang for work on ships under repair at the Sembawang Shipyard, including the ESSO WILHELMSHAVEN. They were under the direct supervision of the Chargeman of Roma Project's welding section, who resides in Singapore. The Roma Project welders were, in turn, under the supervision of A. Marimuthu, the Chargeman for Sembawang Shipyard's welders/burners section, who resides in Singapore. The shipyard workers, including the decedents, who were involved in the vessel's dry docking and repairs were not under the direct or indirect control or supervision of the Respondents or any of the vessel's officers or crew. (R. Vol. 2, pp. 63-65, 132-33, 153-60, 169-71, 172-74)

On March 10, 1977, the vessel's No. 3 port tank was inspected by the Senior Port Chemist of the Port of Singapore Authority, at the request of the Safety Officer of Sembawang Shipyard, and a gas free certificate was issued. The tank was again inspected on the morning of March 13, 1977, by the Shipyard Safety Officer and found to be safe. Sometime thereafter the deceased, along with another welder employed by Roma Project, entered

the No. 3 port cargo tank of the vessel and began welding collar plates. (R. Vol. 2, pp. 142-48, 153-54, 161-68) At approximately 2:35 o'clock p.m. on March 13, 1977, there was an explosion in the No. 3 port tank. Koo and Teo were killed and the third man was knocked unconscious. (R. Vol. 2, pp. 65, 154, 162) The incident was investigated by the Singapore government and a Coroner's Inquest was held, which returned an open verdict in respect to the deaths of both deceased. (R. Vol. 2, p. 135, *et seq.*)

Decedent Leong Chong was employed as a steel worker by Sembawang. On March 24, 1977, the deceased was sent to the lower engine room of the vessel to carry out certain repairs. While in this area the deceased was struck on the head by a valve spindle or other piece of metal and sustained a fractured skull and contusion to the brain and died as a result. At the time of his accident, the deceased was under the direct supervision and control of Sembawang. (R. Vol. 1, pp. 26, 43) The valve spindle that struck the deceased allegedly fell through an access hole from the vessel's machine shop. The only eyewitnesses to the accident were an apprentice pipe worker and a steel worker employed by Sembawang, both of whom reside in Singapore (R. Vol. 1, pp. 100, 111); and a member of the crew of the vessel, whose permanent residence is in Italy (Haessner Affidavit).

ARGUMENT

This Petition presents a classic example of an attempt to employ Rule 60(b) as a substitute for appeal. For whatever reason, Petitioners failed to file a timely notice of appeal from the final judgment entered in this cause

on July 31, 1980, as required by Rule 4 of the Federal Rules of Appellate Procedure.[2] On October 22, 1980, a motion to set aside this judgment was filed pursuant to Rule 60(b) of the Federal Rules, alleging that the Petitioners' failure to appeal on a timely basis was the result of excusable neglect on the part of their counsel and urging that the judgment be set aside because the trial court had committed numerous mistakes of law in rendering its judgment. Petitioners' Rule 60(b) motion was denied by the district court by a minute entry dated December 8, 1981, and this denial was promptly appealed. In affirming the district court, the Court of Appeals held that the legal errors allegedly committed by the district

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2. Petitioners' attorney attempts to excuse his failure to file an appeal by representing to the Court that Petitioners' counsel were in the process of transferring representation, suggesting that the Petitioners were temporarily without counsel. The record will not support this representation. Mr. Musslewhite, Petitioners' present counsel, appeared as a counsel of record in C.A. No. H-78-628 as early as April 10, 1978, when the Original Complaint was filed. (R. Vol. 2, pp. 1, 7). Mr. Louis R. Koerner, Jr., was added as "additional counsel" by Mr. Musslewhite on October 30, 1978 (R. Vol. 2, p. 17). On June 13, 1980, Cynthia A. Norris, an associate of Mr. Koerner's, was allowed by order to withdraw. (R. Vol. 1, p. 135) The Magistrate's Memorandum and Recommendation was not filed until June 23, 1980, and Objections were filed to the Magistrate's Memorandum and Recommendation in behalf of the Petitioners on July 11, 1980. (R. Vol. 1, p. 142) Mr. Robert A. Chaffin served as the Petitioners' attorney-in-charge in C.A. No. H-78-477 until October 6, 1981 more than a year after entry of the Final Judgment, when Mr. Musslewhite formally took over as attorney-in-charge. (R. Vol. 1, pp. 240-241) It seems that the Petitioners were blessed with too many lawyers rather than too few. There were three individual attorneys in the case for the Petitioners when the Final Judgment was entered but none of them felt constrained to file a notice of appeal. At the same time, there is no showing of abandonment by the attorneys of record in this case similar to that which occurred in the *Seven Elves v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981). The proffered explanation as to why no timely appeal was taken is a tacit admission by counsel that the proper method of review was appeal and not a Rule 60(b) motion.

court, if indeed they were errors, were not so obviously incorrect as to constitute a fundamentally misconceived ruling for which relief might be available under Rule 60(b). Having failed to have obtained a full blown review of the underlying judgment from the Court of Appeals as a result of their Rule 60(b) motion, the Petitioners are now before this Honorable Court urging that the Court of Appeals be required to review the dismissal of this cause as if the judgment itself had been timely appealed. Such a review is not available under Rule 60(b).

None of the tradition predicates that underlie a petition for a writ of certiorari are presented by this Petition. There is no conflict among the various circuits nor is the holding below at variance with any of the decisions of this Court so as to call for the exercise of this Court's powers of supervision. Finally, no question of federal law of overriding national concern is presented that would require the intervention of this Court. *See* Rule 17, Revised Rules of the Supreme Court of the United States, 28 U.S.C. All that this Petition is about is a continuing effort by counsel for the Petitioners to obtain a full review through Rule 60(b) of the underlying judgment dismissing this case under the doctrine of *forum non conveniens.*

A. There is no Conflict with the Decisions of this Court.

In their primary thrust to justify the issuance of a writ, the Petitioners urge that the court below unreasonably and improperly narrowed the scope of Rule 60(b) in such a way as to conflict with *Link v. Wabash,* 370 U.S. 625, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), and *Klapprott v. United States,* 335 U.S. 601, 69 S.Ct. 384, 93

L.Ed. 266 (1949). A review of these decisions, however, makes it readily apparent that the holding below is not in conflict with the holding of either case.

Link v. Wabash, supra, in fact did not even deal with Rule 60(b). Instead, it dealt with an appeal from the dismissal of a civil action for want of prosecution when counsel failed to appear at a pre-trial hearing. In upholding the dismissal, the Court observed that it was not required to consider whether the district court would have abused its discretion in rejecting a Rule 60(b) motion since no such motion had been filed. This gratuitous aside obviously suggests that the result might have been different had such a motion been filed.

Klapprott v. United States, supra, dealt with what the Court itself characterized as an "extraordinary situation." A native of Germany who became a naturalized citizen in 1933 had his citizenship cancelled by entry of a default judgment in a civil action in 1942 while he was being held in the custody of the United States because of alleged seditious activity. The entry of the default judgment resulted directly from interference by government agents. At the end of the war against Germany the sedition charges were dismissed by the Government for want of evidence. A divided Court held that Rule 60(b)(6), providing for the setting aside of judgments for "any other reason justifying relief from the operation of the judgment," was applicable because of the extraordinary situation presented by the case.

Both of the cases relied upon by the Petitioners in their attempt to create a conflict deal with the entry of a judgment before the merits of the cause had been fully considered. Here, the judgment which is sought to be set

aside, even though a judgment going to the threshold questions of choice of law and dismissal under the doctrine of *forum non conveniens,* is based on a fully developed record and is a full adjudication on the merits. The judgment here did not arise out of a default or a sanction imposed by the district court upon either the Petitioners or their attorneys. Petitioners' counsel valiantly attempts to rely on his failure timely to appeal as a link to the cases liberally setting aside default judgments under Rule 60(b). However, Rule 60(b) by its very terms looks to the *entry* of a final judgment and relief therefrom, and does not deal directly with or provide relief from a failure to *appeal* final judgments. Moreover, this Petition does not present an "extraordinary situation" as was the case in *Klapprott* to justify the invocation of Clause (6) of the Rule. Rather, the Court is presented with a now almost routine "foreign claimant" maritime case of the type that has become perhaps all too familiar to many of our district courts, distinguished only by the failure of the claimants' attorneys to file a timely appeal because of admitted neglect.

Klapprott, supra, must be read in the light of *Ackerman v. United States,* 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950) and *Polites v. United States,* 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173 (1960), both of which involve unsuccessful attempts to set aside judgments of denaturalization under Rule 60(b)(6). Both of these decisions make it clear that *Klapprott* "was a case of extraordinary circumstances." *Ackerman v. United States, supra,* 340 U.S. at 199. Since no extraordinary circumstance is presented by this case, the decision below is not in conflict with *Klapprott,* or any decision of this Court dealing with relief under Rule 60(b).

B. The Decision of the Fifth Circuit is Consistent With Existing Case Law.

The decision below is also consistent with prior holdings of the Fifth Circuit, and, for that matter, with the general approach being taken by the other circuits to Rule 60(b). In deciding this case, the Fifth Circuit followed the almost identical case of *Alvestad v. Monsanto Co.*, 671 F.2d 908 (5th Cir. 1982), *cert. den.*, ____U.S.____, 103 S.Ct. 489, 74 L.Ed.2d 632 (1982). Both cases involve an effort by the same attorney (Mr. Musslewhite) to obtain relief under Rule 60(b) from the dismissal under the doctrine of *forum non conveniens* of maritime claims asserted by foreign nationals in the United States after having failed to seek review by way of appeal. Both this case and *Alvestad* stand for the proposition that Rule 60(b) cannot be used as a substitute for appeal. While it is now accepted that Rule 60(b) may properly be employed to allow a district court to correct certain mistakes of law, the decisions also recognize that there must be a balance. Thus, in *Alvestad* the court observed that while Rule 60(b) can be used "to reform a judgment in obvious conflict with a clear statutory mandate, we have been equally insistent that Rule 60(b) is not a substitute for the ordinary method of redressing judicial error—appeal." *Id.* at 912. In *Gary W. v. Louisiana*, 622 F.2d 804 (5th Cir. 1980) *cert. den.*, 450 U.S. 994 (1981), the Fifth Circuit held that Rule 60(b) cannot be employed in lieu of appeal to review the application by the trial court of an incorrect legal standard. *See Fackelman v. Bell*, 564 F.2d 734, 735, 737 (5th Cir. 1977).

The cases which allow Rule 60(b) to be employed as a device to obtain relief from a "mistake of law" either

involve the misapplication of clear statutory law, *Compton v. Alton Steamship Co.*, 608 F.2d 96 (4th Cir. 1979); *Meadows v. Cohen*, 409 F.2d 750 (5th Cir. 1969), or a change in the controlling decisional law taking place after the entry of the judgment. *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976); *Oliver v. Home Indemnity Co.*, 470 F.2d 329 (5th Cir. 1972). The district court below did not misapply a facially clear statute in dismissing the Petitioners' claims and there have been no changes in controlling decisional law that would have altered the outcome of this case since the entry of judgment. The most the Petitioners can claim is the possibility of a misapplication of established legal standards by the trial court (a claim the Respondents unequivocally reject.) As a result the Fifth Circuit was correct in holding that there could be no relief from the district court's judgment under Rule 60(b).

C. The Judgment Below is not Based on a Fundamental Misconception of the Law.

The Petitioners contend that the district court made several facially clear errors and fundamental legal misconceptions in dismissing the Petitioners' claims under the doctrine of *forum non conveniens*, including a refusal to apply the tenets of *Lauritzen v. Larson*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1730, 26 L.Ed. 2d 252 (1970); disregard of a forum selection clause in a contract; failure to make a correct analysis of the convenience of the parties; failure to analyze the law of Singapore; disregard of 46 U.S.C. § 764, the Shipowners' Liability (Sick and Injured Seamen) Convention of 1936, 54 Stat. 1693, 28 U.S.C. § 1350, and Article 4678 of the

Revised Civil Statutes of Texas. Finally, the Petitioners contend that the Death on the High Seas Act was extended by the Fifth Circuit after entry of the judgment to apply to the territorial waters of a foreign state. Each of these contentions will be briefly discussed.

1. Misapplication of the *Lauritzen/Rhoditis* Choice of Law Criteria.

Fundamental to the district court's choice of law analysis under *Lauritzen/Rhoditis* was its holding that the Petitioners' decedents were not seamen as a matter of law. Rather, their decedents were shipyard workers employed in the port of Singapore. In light of this, the district court was more than justified in finding more substantiality in the contacts with Singapore than the contacts with the United States. *Cf. Chiazor v. Transworld Drilling,* 648 F.2d 1015 (5th Cir. 1981) *cert. den.,* 455 U.S. 1019 (1982). Suffice it to say that a holding that the general maritime law of the United States applied here would have been as anomalous as holding that the law of Singapore applied to a claim arising out of the wrongful death of an American shipyard worker killed while working aboard a vessel in an American port because the vessel was indirectly owned and controlled by a Singaporean corporation.

2. Forum Selection Clause.

The contention that the forum selection clause contained in the Marine Service Agreement between the vessel owner and Exxon International was not raised below. Moreover, the notion that the law applicable to this case is to be controlled by a forum selection clause in an agreement between the owner and the operator of a vessel would

stretch the rationale of *Bremen v. Zapata*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) far beyond reason. *Cf. H. W. Caldwell & Son., Inc. v. U. S. for John H. Moon & Sons, Inc.*, 407 F.2d 21 (5th Cir. 1969).

3. Convenience of the Parties.

The Petitioners continue to insist that it would be more convenient to try this case in the United States because two American employees of Exxon were overseeing the repair of the vessel and because the Petitioners plan to use American experts. With the exception of the vessel's crew, who were Italian, virtually all of the potential fact witnesses are residents of Singapore, where virtually all of the documentary evidence is located. In the face of this, convenience was hardly even an issue.

4. Law of Singapore.

There is no question but that the courts of the Republic of Singapore are accessible to the Petitioners. Section 12 of Chapter 30 of the Civil Law Act, Singapore Statutes, Revised Edition 1970, provides a wrongful death remedy almost identical with the English Fatal Accident Act of 1946 to the family of a deceased person for death occasioned by the negligence of another. The High Court (Admiralty Jurisdiction) Act, Chapter 6, Sections 3 and 4, Singapore Statutes, Revised Edition, 1970, provides for both *in personam* and *in rem* jurisdiction in death actions as presented here (R. Vol. 2, pp. 192-194) and the Petitioners may also proceed against Exxon and Esso Tankers *in personam* under the High Court's civil jurisdiction pursuant to Section 16(1) of the Supreme Court of Judicature Act, Chapter 15, Singapore Statutes, Revised Edition, 1970. (R. Vol. 2, p. 200) The Petitioners

complain that the law of Singapore may not allow a waiver of the applicable statute of limitation under Singapore law, and yet they cite no authority that this is indeed the case (which it is not).

5. Section 764 of Title 46 U.S.C., Section 4 of the Death on the High Seas Act.

Section 764 is essentially a jurisdictional statute allowing our admiralty courts to entertain claims for wrongful death occurring on the high seas even though foreign law may apply. The district court opinion relied on by the Petitioners, *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D. N.Y. 1941), holds that an action under Section 764 must be brought in admiralty rather than on the law side of the court. It does not address the question of whether the district court can decline to exercise its admiralty jurisdiction in an appropriate case. As the Petitioners would have it, the federal courts are required to take and *retain* jurisdiction over all wrongful death actions where the death or the wrongful act occurs on the high seas (including the territorial waters of a foreign nation). Such a result would overburden our district courts and is absurd.

6. Shipowners' Liability Convention of 1936 and 28 U.S.C. § 1350.

The Shipowners' Liability Convention was not relied upon by the Petitioners below. Since the district court was not asked to consider it, the effect of the Convention, if any, is not properly before the Court. Moreover, maritime torts are not considered to be violations of the law of nations or any treaty of the United States. *Damaskinos v. Societa Navigacion Interamericana, S.A.*, 255 F. Supp.

919, 923 (S.D. N.Y. 1966); *Lopes v. Reederei Richard Schroder,* 225 F. Supp. 292, 295-297 (E.D. Pa. 1963).

7. Article 4678, Revised Civil Statutes of Texas.

Petitioners contend that Article 4678 of the Texas Civil Statutes required the district court to retain jurisdiction over this claim and, implicitly, that a federal court sitting in Texas can have its discretion to decline to exercise its jurisdiction under the doctrine of *forum non conveniens* controlled by the legislature of the State of Texas. Certainly such a position must fail under the Supremacy Clause of the United States Constitution. *See Kossick v. United Fruit Co.,* 365 U.S. 731, 738-39, 81 S.Ct. 886, 6 L.Ed.2d 56, 62-63 (1961). Article 4678 must be considered substantive law of the State of Texas. *See Penry v. Wm. Barr, Inc.,* 415 F. Supp. 126, 128 (E.D. Tex. 1976); *Gutierrez v. Collins,* 583 S.W.2d 312, 317 n.3 (Tex. 1979). As such, it is preempted by federal maritime law. *Lindgren v. United States,* 281 U.S. 38, 44-46, 50 S.Ct. 207, 74 L.Ed. 686, 691-92 (1930). The application of Article 4678 of the Texas Wrongful Death Statute to this cause would have flown in the face of the doctrine of uniformity of admiralty and maritime law. *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 216, 37 S.Ct. 524, 61 L.Ed. 1086, 1098 (1917).

8. Application of DOHSA to Foreign Territorial Waters.

The Petitioners contend that following entry of judgment there was a change in controlling decisional law in that the Fifth Circuit extended the coverage of the Death on the High Seas Act, 46 U.S.C. § 761, *et seq.* (DOHSA) to include the territorial waters of a foreign nation. It is

submitted that no such post-judgment change in the controlling decisional law occurred.

By its terms, DOHSA applies to wrongful deaths "occurring on the high seas beyond a marine league from the shore of any State." The Ninth Circuit in *Roberts v. United States,* 498 F.2d 520 (9th Cir.), *cert. den.,* 419 U.S. 1070 (1974) declined to specifically decide whether DOHSA applied to the territorial waters of a foreign sovereign. In doing so, the Court said:

> The appellees' alternate reliance upon the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768, is more questionable. Although the Supreme Court has explicitly sanctioned the bringing of aviation wrongful death cases under a literal construction of the DOHSA, the facts alleged in the appellees' own brief cast doubt upon the statute's applicability. The appellees concede that the alleged tort occurred a maximum of 1900 feet from the Okinawa shore, i.e., in presumably foreign territorial waters. In view of the somewhat ambiguous language of the statute itself and the apparent lack of authority on the point, we hesitate to conclude whether a tort occurring within foreign territorial waters comes within the purview of the Death on the High Seas Act. (Footnote omitted.) *Id.* at 524.

In *Cormier v. Williams/Sedco/Horn Constructors,* 460 F. Supp. 1010, 1011 (E.D. La. 1978), it was held with little discussion that an inland river in Peru constituted the "high seas" for the purposes of DOHSA in a case involving the death of an American seaman. In *Mancuso v. Kimex, Inc.,* 484 F. Supp. 453, 454 (S.D. Fla. 1980), the district court held it had jurisdiction under the DOHSA in an airplane crash occurring in the territorial waters

of Jamaica resulting in the death of the plane's American flight engineer.

Neither *Cormier* nor *Mancuso* were binding on the district court below as it is well established that a decision of one district court is not binding on other district courts. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 457, 461 (E.D. Pa. 1972); *Porter v. Bowers*, 70 F. Supp. 751, 753 (W.D. Mo. 1947). Moreover, both of these cases were decided before entry of the district court's final judgment in this case and certainly cannot be categorized as post-judgment changes in controlling decisional law.

Both *Cormier* and *Mancuso* recognize that the meaning of "high seas" is crucial in a determination of the applicability of DOHSA to the territorial waters of a foreign nation. In this connection, it should be noted that the Fifth Circuit, in another context, has defined "high seas" as "all parts of the sea not included in the territorial or internal waters of a nation." *Treasure Salvors v. Unidentified Wreck, etc.*, 569 F.2d 330, 338 n.14 (5th Cir. 1978).

In *Sanchez v. Loffland Bros. Co.*, 626 F.2d 1228, 1230 (5th Cir. 1980), *cert. den.*, 452 U.S. 962 (1981), which allegedly constitutes the post-judgment change in the decisional law, the Fifth Circuit held the two year statute of limitations under DOHSA applicable to a wrongful death action arising under the general maritime law involving the death of a seaman in Lake Maracaibo, Venezuela. In so doing, the Court did not address the issue of the applicability of DOHSA within the territorial waters of a foreign nation. However, in a footnote, the Court noted:

> DOHSA is applicable to the death of a person who is not a Jones Act seaman whenever the wrongful act occurs on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States. 46 U.S.C. § 761. The statute has been applied when the cause of action arises outside of United States territorial waters and within the territorial waters of a foreign country. *Public Administrator of the County of New York v. Angela Compania Mariera,* 592 F.2d 58 (2d Cir. 1979); *Mancuso v. Kimex, Inc.,* 484 F. Supp. 453 (S.D. Fla. 1980); *Cormier v. Williams/Sedco/Horn Constructors,* 460 F. Supp. 1010 (E.D. La. 1978). But *See, Roberts v. United States,* 498 F.2d 520 (9th Cir. 1974). *Id.* at 1230, n.4.

See also Public Administrator of County of New York v. Angela Compania Naviera, S.A., 592 F.2d 58, 64 (2nd Cir. 1979), *cert. dismissed,* 443 U.S. 928, 100 S.Ct. 15, 61 L.Ed.2d 897 (1979), where the Court held that the doctrine of laches is to be applied to the wrongful death actions brought under the general maritime law in light of the two year statute of limitations found in the Death on the High Seas Act.

THE STANDARD FOR REVIEW

The review of a denial of a motion pursuant to Rule 60(b) of the Federal Rules to set aside a final judgment is limited to the question of whether the district court abused its discretion in denying the motion. An appeal from such a motion is narrower than the review of a final order on appeal and does not bring up the underlying judgment for review. *Phillips v. Insurance Company of North America,* 633 F.2d 1165, 1167 (5th Cir. 1981);

Silas v. Sears Roebuck & Co., Inc., 586 F.2d 382, 386 (5th Cir. 1978). *See, Browder v. Director, Department of Corrections of Illinois,* 434 U.S. 257, 263 n.7, 98 S.Ct. 556, 54 L.Ed.2d 521, 530 n.7, *reh. den.* 434 U.S. 1089, 98 S.Ct. 1286, 55 L.Ed.2d 795 (1978). In *Seven Elves, Inc v. Eskenazi,* 635 F.2d 396, 402 (5th Cir. 1981), the Court, in discussing the abuse of discretion standard used in reviewing the denial of Rule 60(b) motions, stated: "it is not enough that the granting of relief might have been permissible, or even warranted—denial must be so *unwarranted* as to constitute an abuse of discretion."

Petitioners incorrectly assert that the proper standard of review is "slight abuse" of discretion, relying on *Seven Elves, Inc. v. Eskenazi, supra.* The "slight abuse" standard applies only to judgments that dispose of an action other than on the merits, such as in the case of a default judgment. *Varnes v. Local 91 Glass Bottle Blowers Asso.,* 674 F.2d 1365, 1369 (11th Cir. 1982); *Ellingsworth v. Chrysler,* 665 F.2d 180, 185 (7th Cir. 1981); *Erick Rios Bridoux v. Eastern Air Lines,* 214 F.2d 207 (D.C. Cir. 1954), *cert. den.,* 348 U.S. 821 (1954). While the Court found it unnecessary to characterize the underlying judgment in the *Seven Elves* case, it is clear that it found that the judgment bore many of the characteristics of a default judgment because "the full merits of the cause were not examined." 635 F.2d at 403.

Any suggestion that the district court's final judgment of July 31, 1980, granting Respondents' motions for summary judgment and to dismiss under the doctrine of *forum non conveniens,* was not a judgment on the merits flies in the face of reality. The judgment was based on a

fully developed record containing numerous affidavits and exhibits, including the Notes of Evidence of the Singapore Coroner's Inquests into each of the three deaths out of which these cases arose. This record established the circumstances of each incident; the employment of each of the deceased; the background of the vessel, including the details of its relevant contacts with the United States, the availability of an appropriate wrongful death remedy under the laws of Singapore, including the fact that the Respondents are amenable to process in Singapore; and the names and nature of expected testimony of all known fact wtinesses, etc. Petitioners filed no controverting affidavits, nor did they obtain the deposition testimony of any witness, as required by Rule 56(e) of the Federal Rules of Civil Procedure, even though these actions pended for more than two years and Respondents' motions were on file for some sixteen months before the final judgment was entered.

In its Order of Dismissal, the district court adopted the Magistrate's Memorandum and Recommendation as its own. The Magistrate's Memorandum contained the following conclusions of law:

1. The deceased were not seamen within the meaning of the Jones Act.
2. The Death on the High Seas Act does not provide a remedy to the Petitioners.
3. The Longshoremen's and Harbor Workers' Compensation Act does not provide a remedy to the Petitioners.
4. The law of Singapore, rather than the law of the United States, controls the Petitioners' rights and remedies.

5. The Petitioners' actions should be dismissed under the doctrine of *forum non conveniens.*

On this basis, the district court exercised its discretion and dismissed the consolidated actions under the doctrine of *forum non conveniens.*

Since the underlying final judgment in this action was clearly a judgment on the merits, the "slight abuse" standard employed in the review of the denial of Rule 60(b) motions from default judgments is not applicable. The issue before the Court of Appeals was simply whether the district court's denial of the Appellants' Rule 60(b) motion was so *unwarranted* as to constitute an abuse of discretion. The Court of Appeals correctly applied that standard in affirming the district court.

CONCLUSION

The Petitioners' statement of the issues in the "Questions Presented For Review" found on the first page of their Petition for Certiorari belies the fact that what is actually being sought here is a review of the underlying judgment in the nature of an appeal, using Rule 60(b) simply as a device to accomplish that end. The Court below clearly understood the nature of the review being sought and properly refused to grant such a review, holding in essence that Rule 60(b) cannot be used as a substitute for the normal appellate process.

To grant to the Petitioners the review they seek would effectively emasculate the appellate process and allow litigants to obtain review of adverse judgments long after the time for appeal had passed upon the simple contention that the trial court committed legal error. Such a possi-

bility cannot be entertained. For this and the other reasons enumerated here, the Petition for Writ of Certiorari filed herein must be denied.

Respectfully submitted,

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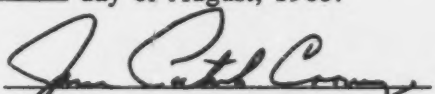
Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari upon Benton Musslewhite, Esq., 609 Fannin Street, Suite 517, Houston, Texas 77002, the attorney for the Petitioners herein, by placing the same in the United States Certified Mail, Return Receipt Requested, in a properly addressed package with adequate postage thereon, on this, the 5th day of August, 1983.



OF ROYSTON, RAYZOR, VICKERY & WILLIAMS